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ABSTRACT

The legal aspects of the many campus issues were the concerns of the conference sponsored jointly by the Institute of Higher Education and the Center for Continuing Education. The conference, held at the University of Georgia Center for Continuing Education, July 1972, presented and discussed decisions and trends concerning campus law and their implications for and applications to the posture of academic decisionmaking. Issues included an overview of rights and responsibilities on campus; the legal responsibilities of administrators; the relationship between the university and local law enforcement agencies in their response to drug abuse on campus; the rationale determining the legal distinction between public and private institutions of higher education; constitutional rights and non-renewal of faculty contracts; and collective bargaining on campus. (MJM)

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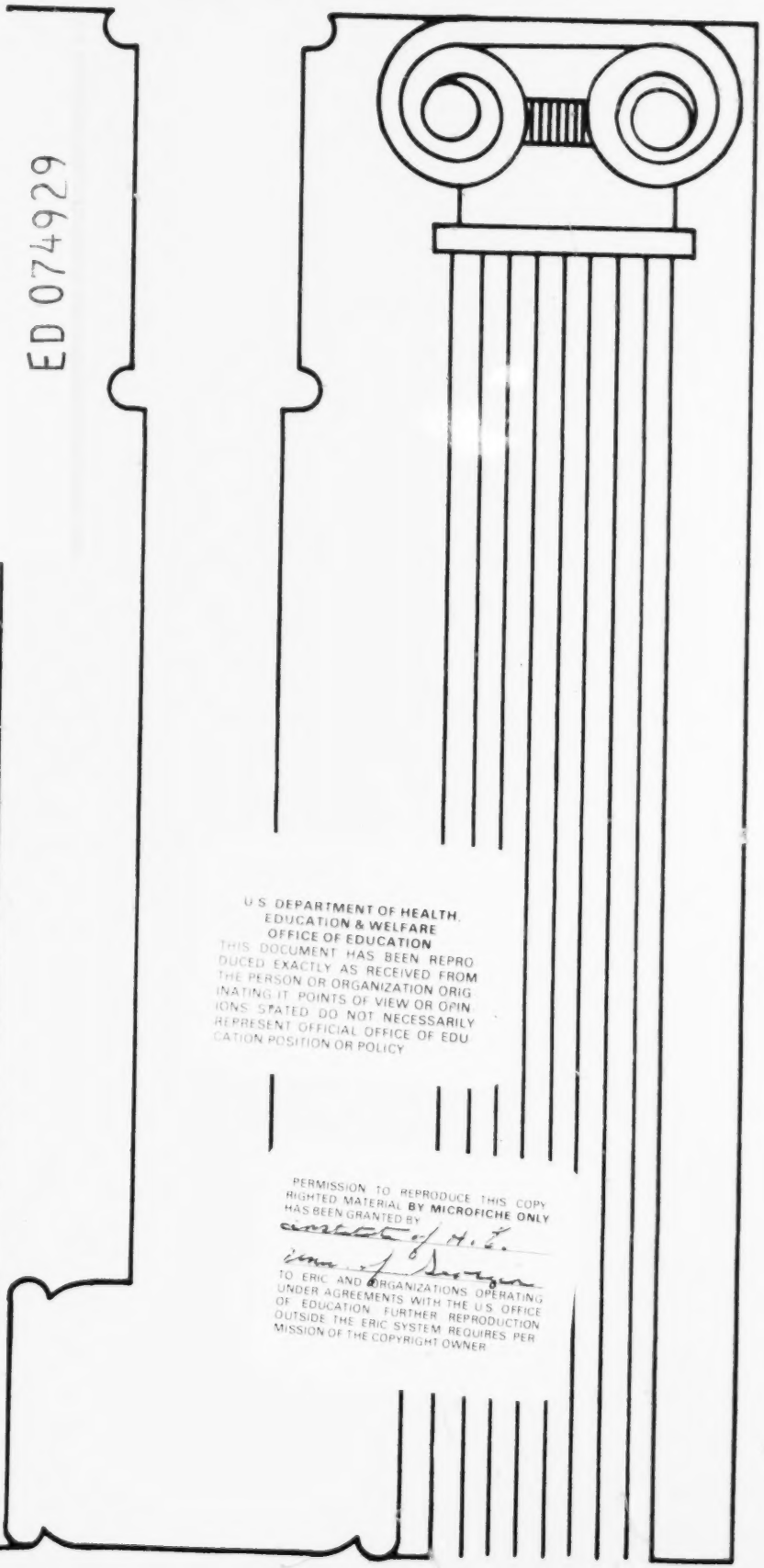

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The University of Georgia
Institute of Higher Education
Center for Continuing Education

HIGHER EDUCATION: THE LAW AND CAMPUS ISSUES

ED 074929

Proceedings

HIGHER EDUCATION: THE LAW AND CAMPUS ISSUES

Edited by

D. Parker Young

Sponsored by

THE UNIVERSITY OF GEORGIA

Institute of Higher Education

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Athens, Georgia

July 6–7, 1972

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INTRODUCTION

The influence of court decisions which affect the administration of higher education is nothing short of revolutionary. Gone are the days of in loco parentis when the dean could simply tell a student to pack up and leave since his conduct was not the kind befitting a student at that college. In addition to the relationships between students and the institution, court decisions have now affected every facet of higher education administration so that today it is absolutely imperative that any administrator have a knowledge of the legal parameters within which he may make decisions.

The legal aspects of the many campus issues were the concerns of the conference "Higher Education: The Law and Campus Issues." The conference was sponsored jointly by the Institute of Higher Education and the Center for Continuing Education and held at the University of Georgia Center for Continuing Education on July 6–7, 1972. The central purpose of the conference was to present and discuss judicial decisions and trends and their implications for and applications to the posture of academic decision-making. The issues of concern were questioned and examined, not from a philosophical or sociological point of view but in light of court decisions and precedents. The topics discussed by the conference speakers are the subject of this publication.

In presenting an overview of rights and responsibilities on campus, I tried to show that individuals do not divest themselves of their constitutional rights when they enter the campus gates. Neither, however, do they acquire special privileges. Administrators have the responsibility to see that the campus climate is such that each individual may progress to the fullest extent of his potential. I also pointed out that, although the courts are not anxious to review all administrative action, the closer a school rule or administrative action comes to infringing upon basic constitutional rights, the more justification administrators must have for the rule or action taken pursuant to the rule. Specific topics reviewed included freedom of expression, student records, due process, and faculty rights and responsibilities.

Professor Seitz focused his presentation upon the legal responsibility of administrators. He suggested several precautions that administrators should exercise in guarding against libel, including the following: drawing up of plans concerning guidelines for calling police; knowledge of briefings held for police; restraints against censorship of student publications; limitations pertaining to search and seizure; and guarantees concerning "privileged communication." Professor Seitz added the fact that courts will note efforts of advanced planning by administrators to develop explicit guidelines concerning legal issues. He concluded that rules set forth by administrators must not be vague or overbroad if they are to be effective.

Mr. Bickel discussed the topic "The Relationship Between the University and Local Law Enforcement Agencies in their Response to the Problem of Drug Abuse on the Campus." He prefaced his remarks by reminding the audience that the provisions of the Fourth Amendment to the Constitution guarantee security against unreasonable search and seizure. The question which inevitably arises is: "Which searches and which seizures are characterized as unreasonable?" The legal complexities of the question make cooperation between the university and the local law enforcement agencies mandatory. The university must review provisions of local and state law and the case law as they apply to those factors present in the university's response to the drug abuse problem on campus.

A discussion of the rationale determining the legal distinctions between public and private institutions of higher education was presented by Dean Yegge. He discussed in detail the historical development of colleges in America, continuing to the present, emphasizing the trend toward diminishing distinguishing characteristics between public and private institutions. He suggested that there is growing dissatisfaction with the doctrine which perpetuates a distinction between public and private institutions in disciplinary matters and questioned whether there is still some significant quality about the private school that distinguishes it from the state school.

Dr. Slepin spoke on "Constitutional Rights and Non-Renewal of Faculty Contracts." His presentation concentrated on two recent court cases that issued decisions wherein the Fourteenth Amendment's guarantee of procedural due process--including a hearing, notice of charges or cause, etc., prior to non-renewal--was held to be applicable to every terminated or non-renewed teacher who has "a legitimate claim of entitlement" to reemployment. On the basis of these cases, he pointed out that the only party not entitled to a hearing prior to non-renewal is the teacher who has no tenure, no continuing contract, no "property interest" assertable, no warranted fear of professional detriment, and who fails or refuses to assert that his non-renewal is based on his exercise of constitutional rights or otherwise constitutes some actionable wrong. It was stressed that although the cases possessed merit, they were elusive in stating whether non-renewal adversely affects professional status sufficiently to threaten liberty--i.e., does not sully the good name, reputation, honor or integrity of the teacher.

Professor Beaird discussed "Collective Bargaining on Campus." He stated that we are on the verge of a real revolution in higher education, with the advent of collective bargaining on college campuses. The development of collective negotiation in higher education was traced, with distinctions drawn between public and private institutions. Particular emphasis was accorded to National Labor Relations Board jurisdiction. Overall, he presented a general overview of legal information regarding collective negotiations.

The law is ever-evolving, and the papers presented here reflect this fact. There are few absolute answers in trying to find solutions to the many issues on campus. The conference presentations, as well as the question and answer discussion sessions, clearly showed that the rights and responsibilities of all on campus must be considered in attempting to confront the issues in order that the institution remain a free marketplace of ideas.

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RIGHTS AND RESPONSIBILITIES ON CAMPUS--AN OVERVIEW

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In any free society, the rights and freedoms of the individual are of paramount concern. Indeed no society can be classified as being "free" if it does not provide for maximum individual freedom. However, in order for individuals to live peacefully side by side, individual freedom must always be accompanied by another ever-present condition--namely, individual responsibility with a respect for the rights of others and of society as well. The individual also has the responsibility ever to guard his own freedom.

Inevitably the rights of the individual and the rights of society come into conflict. As a result, in this country we see in our system of judicial review the ever-present struggle that exists between these two forces. Times, places, and circumstances change, and what may be the appropriate limits for the individual in the exercise of his rights may well change with these variables. Thus, this continual balancing of the rights of the individual and those of society is carried on in our courts.

Individual rights occupy a preferred position among those rights granted in our federal Constitution; and the courts, led by the United States Supreme Court, zealously protect those rights. But as we become an ever increasingly complex society in which the affairs of men, women, and organizations become more and more intertwined, then the rights of society must be given great weight.

The struggles for the rights of individuals have not avoided our college and university campuses. Indeed, we have become weary of the great weight of newsprint and television time devoted to those struggles on our campuses during the past decade.

The idealism of our youth, as well as a sense of justice, caused them to join in the civil rights movement; and the successes scored by that endeavor gave impetus to similar action on campus. This coupled with the **Dixon**[1] decision spelled the end of in loco parentis on our campuses as we had known it up to that time. And if any notion of in loco parentis still persists today, especially in public institutions, then I think such contentions should be laid to rest by the latest amendment to the federal Constitution, the amendment giving the right to vote to eighteen-year-olds in all elections as well as by various states' legislation lowering the age of majority to eighteen.

Now the campus has become a focal point of protest by students who seek changes in our society, changes which for the most part cannot be affected by a single educational institution. But in the absence of an extreme emergency, a society which allows its educational institutions to become politicized or to be intimidated or finally closed by a few bent upon disruption and destruction is a society that has lost its perspective and will to maintain real freedom for all. And that society will soon reap an ever increasing harvest of further destruction of its institutions.

Colleges and universities have a special responsibility in the maintenance of freedom not only within their own confines but throughout our society as well. And you, as influential leaders in these institutions, have an increasing responsibility to help maintain its integrity. You also have the opportunity to help shape and create the

atmosphere in that institution so that each student may progress to the fullest extent of his capacity and potential.

So what is the legal setting within which higher education finds itself today with respect to individual rights and responsibilities? Our courts have consistently ruled that educational institutions have an inherent authority to maintain order and freedom on the campus and to discipline, suspend, and expel students and others whose conduct is disruptive.[2] Both federal and state courts have stated this fact. A sample of the language used by the courts is that in **Esteban** v. **Central Missouri State College.** Allow me to quote from that decision.

> We do hold that a college has the inherent power to promulgate rules and regulations; that it has the inherent power properly to discipline; that it has power appropriately to protect itself and its property; that it may expect that its students adhere to generally accepted standards of conduct . . .[3]

It is of some significance to note that this decision was written by Mr. Justice Blackman, now a member of the U. S. Supreme Court.

Our courts are not anxious to become college administrators and handle every act of disobedience and disruption on campus. They will interfere only where administrators act outside the legal parameters set forth by the judiciary. However, **the closer a school rule or administrative action comes to infringing upon basic constitutional rights, the more justification administrators must have for the rule or action taken pursuant to the rule.**

Courts have also stated that it is a duty on the part of administrators to maintain order and freedom on campus, and this applies to non-students as well as students.[4] This is not to say that the student is forbidden to express his beliefs or opinions or to attempt to bring about change concerning the institution. He may attempt to bring about change, but he has the responsibility to pursue change through the proper channels and procedures. The institution has the responsibility to see that its standards are consistent with the lawful purposes of the institution and that the process of change through proper channels and procedures is reasonably effective.

Students have the same status as adults insofar as constitutional guarantees are concerned; that is, they do not leave their constitutional guarantees at the campus gate, nor do they acquire special privileges.

Now what, specifically, are some of their rights regarding speech and assembly as well as other constitutional guarantees? Just exactly what speech or what assembly is guaranteed is debatable. There is no absolute freedom of speech, as Justice Holmes so well pointed out when he said:

> The most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic.[5]

Also, there is no absolute freedom of assembly. Students have the right to demonstrate so long as they do not substantially interfere with the on-going activities of the institution or with the rights of others. Neither may they engage in the destruction of property. This was the standard or test laid down by the U. S. Supreme Court in **Tinker** v. **Des Moines Independent County School District.**[6] In attempting to curb student demonstrations the burden is upon the institution to show that the actions of the students are indeed unlawful in that they materially disrupt the on-going activities of the institution or that they interfere with the rights of others or that they are destructive of property. Courts have held that students have the right to assemble at college or university buildings but that they have no right to exclude others from free movement in the area or building.[7]

There can be no blanket prior restraint on speech or assembly in institutions of higher education. The circumstances surrounding each case dictate the extent to which speech and assembly are protected. Certain necessary ground rules, though,

have been upheld. For example, the Federal Courts of Appeals[8] has held that a campus rule which regulates the time and place of demonsrations, with a forty-eight-hour reservation requirement, does not on its face violate First Amendment rights; nor does it constitute a prior restraint upon such rights.

There is no absolute right, per se, for a student organization to be granted official recognition on campus. However, once a college allows student groups to organize and grants these groups recognition, with the attendant advantages, constitutional safeguards must operate in favor of all groups that apply. This requires adequate standards for recognition and the fair application of these standards.

The United States Supreme Court, in **Healy** v. **James,**[9] held that the burden of proof is upon the institution to justify its non-recognition of a student organization. The court did point out that a college administration may impose a requirement that a group seeking official recognition affirm in advance its willingness to adhere to reasonable campus law.

Educational administrators may not exercise censorship of student newspapers or publications. In the absence of a showing of material disruption, of interference with the rights of others, or that the publication is obscene, censorhip and control of such a publication by college officials is deemed an unwarranted interference with protected constitutional rights. It is clear that the right to express views may not be restricted unless there is a "clear and present danger" to society. The burden of proof is upon the institution to show the existence of such a danger.[10]

By the same token, in order to be valid, a regulation restricting campus speakers must, in objective language, preclude only that speech forbidden under the doctrine of "clear and present danger."[11] Again, the burden of proof is upon the institution to show the existence of such a danger.

College and university rules regulating certain modes of dress, certain hair styles (including length), and beards have been held in violation of equal protection in the absence of a relationship to the health, safety, welfare, morale, or discipline of any student.

Another sensitive area of concern on campus is that of student records. In discussing this subject there are two legal concepts to be considered--namely, privacy and confidentiality.[12] The right of privacy is a fairly new legal right. Georgia, in 1905, became the first state to legally recognize this right. Everyone has this right. It does not exist because of any relationship between the student and the institution. The college or university may not pry unnecessarily into the personal affairs of a student, and the school may not reveal to others information concerning its students unless it has a proper basis for doing so. Since right of privacy belongs to a person, he may release as much of it as he chooses. A student may sign a release when he gives the school information, but even so, he does not necessarily release it for all purposes. In other words, he does not give up his right to privacy in toto.

Confidentiality is an old legal concept. As a legal matter it arises as a result of some legal relationship (such as communications between man and wife or lawyer and client). Confidential communications are certain classes of communications passing between persons who stand in a special relation to each other, or who on account of their relative situation are under a special duty of secrecy and fidelity. In legal contemplation the communications are confidential because they are intended to be held in confidence or kept secret. The key word is "intended." A student may release certain confidential information, and thus the school may disclose it. The institution may release certain information to those persons and agencies which have an "overriding legitimate purpose" and "need to know" in obtaining such information.

Certain parts of a student's record that never need to be treated as confidential are as follows:

1. The fact that he attended the school.

2. Dates of his attendance.

3. Whether or not he received a degree.

4. The degree or degrees that he received.

5. The dates upon which the degree (or degrees) were conferred.

On the other hand, certain parts of a student's record that are normally to be treated as confidential are as follows:

1. Details of his academic record.

2. Details of any disciplinary actions.

3. Letters of recommendations and other communications of this type.

Students have the right to be free from unreasonable searches and seizures in dormitory rooms, student lockers, etc. Unless an emergency situation exists, a search warrant should be obtained prior to any such search or seizure. However, when there is "reasonable cause to believe" that danger is present, then reasonable searches may be conducted without a warrant.[13] (An example of such circumstances would be that of a bomb threat.) I say this because there is a responsibility on the part of the institution to provide for the health, safety, and welfare of all on campus.

Since the landmark **Dixon** case in 1961, students in public colleges possess the right to all due process protection in any disciplinary proceeding which involves long-term suspension or expulsion. This means that in these types of proceedings an accused student must be given adequate notice and an opportunity for a hearing.

Well, just what is due process? There is no absolute and final definition of due process of law. Courts have refused to formulate a precise definition and have preferred to define it "by the gradual process of judicial inclusion and exclusion." In general it may be said that due process is met when the principles of fair play are invoked and when actions are reasonable, just, and not arbitrary.

There are two kinds of due process--procedural and substantive. Procedural due process refers to the procedures and methods employed in seeing that laws and regulations are carried out and enforced. Substantive due process goes to the very heart of the law or regulation in question. It questions not merely the procedures and methods employed in any proceeding, but whether the purpose of the law or regulation is fair, reasonable, and just.

Student disciplinary proceedings have been held to be civil and not criminal proceedings and therefore do not necessarily require all of the judicial safeguards and rights accorded to criminal proceedings.[14] Courts have held that private institutions are not engaged in "state action" and therefore are not subject to the due process clause in the Fourteenth Amendment and are not required to follow the dictates of due process in dealing with students.[15] However, I think that it is fair to say that most legal scholars see the distinction that exists between public and private colleges as losing its vitality--based upon the trend in court decisions.

Although it is impossible to cover every conceivable situation in a set of rules pertaining to students, due process requires that there should not be undue vagueness or overbreadth in the rules governing students. The degree of specificity of the rules will, of course, vary. Colleges and universities have not been required to have specific rules and regulations to the extent necessary in criminal statutes. However, "misconduct" as a standard for disciplinary action has been held unduly vague and overbroad.[16] The general standard in this area is that the degree of specificity required is that which allows a student adequately to prepare a defense against the charge.[17]

Many colleges and universities have felt the need to employ an interim suspension of students in order to maintain order and freedom on the campus. The only rationale for such suspension is that the continuing presence of the student on the campus constitutes danger to that individual and/or others or property. There must be a quick hearing, probably within one to three days, in

order to allow the student an opportunity to show that his presence does not constitute a danger.[18]

As administrators and faculty have an obligation and a responsibility to maintain freedom on campus, so too do students in addition to their rights take on responsibilities. I would like to quote from **Esteban** v. **Central Missouri State College**:

> College attendance, whether it be a right or a privilege, very definitely entails responsibility. This is fundamental. It rests upon the fact that the student is approaching maturity. His elementary and secondary education is behind him. He already knows, or should know, the basics of decent conduct, of nonviolence, and of respect for the rights of others. He already knows, or should know, that destruction of property, threats to others, frightening passersby, and intrusions upon their rights of travel are unacceptable, if not illegal, and are not worthy of one who would pursue knowledge at the college level.
>
> These plaintiffs are no longer children. While they may have been minors, they were beyond the age of 18. Their days of accomplishing ends and status by force are at an end. It was time they assumed at least the outward appearance of adulthood and of manhood. The mass denial of rights of others is irresponsible and childish. So is the defiance of proper college administrative authority . . . and being a part of a proscribed college peace-disturbing and property-destroying demonstration. One might expect this from the spoiled child of tender years. One rightly does not expect it from the college student who has had two decades of life and who, in theory, is close to being "grown up."[19]

Faculty members have the same rights of speech and assembly as do all citizens, and certainly they may not be censured or dismissed for the exercise of their constitutional rights. However, I think it is clear that they will increasingly be made accountable for their actions inside as well as outside the classroom in so far as maintaining the integrity of the educational institution.

Up to now most of the campus confrontations have been between students and administrators. I am confident, in my own mind at least, that there will be increasing confrontations on campus between students and faculty concerning the area of instruction and arbitrary student evaluation. Also, academic freedom will indeed be examined with the same scrutiny as has been given administrative policies and decisions.

Students will demand, and deserve I think, due process in academic affairs. This is not to say that academic freedom or any of the professor's prerogatives should be infringed upon. Rather, it is a call for the promulgation and publicizing of definite standards and requirements in the realm of academics. Standards for evaluating students' classroom performances should be precisely stated for each course, preferably in writing, at the beginning of a course. And there should be some documented orderly procedure of appeal for cases involving academic assessments which are allegedly based upon other than academic grounds and which can be clearly shown to be injurious to the student in his academic career.

The good professor and academic administrator will have nothing to fear from the implementation of this type of due process. But faculty members **would** tend to re-think and update their course content, requirements, and grading procedures. Students would more clearly understand what is required of them. And I believe that the quality of instruction would be improved under such circumstances.

Until just recently educational administrators were involved in court action as a result of students' asserting their real or alleged constitutional rights. Today, however, if administrators allow material disruption to occur on campus without making an effort to maintain order and freedom or if they allow the institution to be closed as a result of pressure exerted, then they should prepare for court suits against them for abdication of their responsibility.

But legal proceedings, leading to a loss of institutional autonomy, are neither necessary nor desirable for higher education. Higher education

today is faced with the axiomatic truth that where it does not establish procedures for self-government it will be governed by others, and when it does not accept its responsibilities it will be held legally accountable.

Higher education is and should be a free marketplace of ideas. The responsible open forum is an absolute necessity if higher education is to forge ahead to new frontiers of knowledge. To remain out on that cutting edge of new knowledge requires that there be constant questioning of old laws and truths and ways of doing things. This is, of course, at times disturbing to the equilibrium of society. But such is the testing and trying which makes for a better society.

Higher education must have the support of society if it is to survive and flourish. Taxpayers are most reluctant to support any public institution if it is viewed as unable to police its own ranks as well as maintain order and freedom on campus. Alumni, friends, and supporters of private higher education are most selective and reluctant in their support for those institutions as well.

In attempting to hold the confidence of society and to maintain a responsible free marketplace of ideas, the first order of business for any college or unviersity is to determine its true aims and purposes. Not all institutions will have the same goals, nor should they. Next, the institution should determine, consistent with constitutional guarantees, those rules, regulations, and standards necessary for the implementation of those aims and purposes. These should then be made known, without apologies, to all who would enter the gates of the institution. And finally it is **absolutely imperative** that boards and administrators be endowed with a determination to stand firm for the real missions of the institution and to enforce, with fairness and justice, the necessary rules and regulations to maintain the accepted standards. Those colleges and universities which seriously undertake such a course of action can expect to enjoy the respect and support of society and thereby flourish as a responsible open forum with a recognition of the rights and responsibilities of all.

FOOTNOTES

1. Dixon v. Alabama State Board of Education, 294 F. 2d 150 (1961).

2. Tinker v. Des Moines Independent Community School District, 393 U. S. 503 (1969); Esteban v. Central Missouri State College, 415 F. 2d 1077 (1969); Norton v. Discipline Committee of East Tennessee State University, 419 F. 2d 195 (1969); Goldberg v. Regents of University of California, 57 Cal. Rptr. 463 (1967); Schuyler v. State University of New York at Albany, 297 N. Y. S. 2d 368 (1969); Barker v. Hardway, 283 F. Supp. 228 (1968); Hammond v. South Carolina State College, 272 F. Supp. 947 (1967); Buttney v. Smiley, 281 F. Supp. 280 (1968); Zanders v. Louisiana State Board of Education, 281 F. Supp. 747 (1968); Evers v. Birdsong, 287 F. Supp. 900 (1968); Scoggin v. Lincoln University, 291 F. Supp. 161 (1968); Smith v. Ellington, 334 F. Supp. 90 (1971); Bayless v. Martine, 430 F. 2d 873 (1970); Sword v. Fox, 446 F. 2d 1091 (1971).

3. Esteban v. Central Missouri State College, 415 F. 2d 1077 (1969).

4. Evers v. Birdsong, 287 F. Supp. 900 (1968); Smith v. Ellington, 334 F. Supp. 90 (1971).

5. Schenck v. United States, 249 U. S. 47 (1919).

6. 393 U. S. 503 (1969).

7. Buttney v. Smiley, 281 F. Supp. 280 (1968); Scoggin v. Lincoln University, 291 F. Supp. 161 (1968); Esteban v. Central Missouri State College, 290 F. Supp. 622 (1968); Bayless v. Martine, 430 F. 2d 873 (1970); and Sword v. Fox, 446 F. 2d 1091 (1971).

8. Bayless v. Martine, 430 F. 2d 873 (1970); Sword v. Fox, 446 F. 2d 1091 (1971).

9. Healy v. James, 92 S. Ct. 2338 (1972).

10. Dickey v. Alabama State Board of Education, 273 F. Supp. 613 (1967); Antonelli v. Hammond, 308 F. Supp. 1329 (1970); Lee v. Board of Regents of State Colleges, 306 F. Supp. 1097 (1969); Schenck v. United States, 249 U. S. 47 (1919); Norton v. Discipline Committee of East Tennessee State University, 419 F. 2d (1969). Goldberg v. Regents of University of California, 57 Cal. Rptr. 463 (1967).

11. Dickson v. Sitterson, 280 F. Supp. 486 (1968); Snyder v. Board of Trustees of University of Illinois, 286 F. Supp. 927 (1968); Brooks v. Auburn University, 296 F. Supp. 188 (1969); Smith v. University of Tennessee, 300 F. Supp. 777 (1969).

12. Zackry v. Brown, 299 F. Supp. 1360 (1967); Calbillo v. San Jacinto Junior College, 305 F. Supp. 857 (1969).

13. Moore v. Student Affairs Committee of Troy State University, 284 F. Supp. 725 (1968); People v. Cohen, 292 N. Y. S. 2d 706 (1968); United States v. Coles, 302 F. Supp. 99 (1969).

14. Dixon v. Alabama State Board of Education, 294 F. 2d 150 (1961).

15. Grossner v. Trustees of Columbia University in City of New York, 287 F. Supp. 535 (1968); Torres v. Puerto Rico Junior College, 298 F. Supp. 458 (1969); Powe v. Miles, 407 F. 2d 73 (1968); Brown v. Mitchell, 409 F. 2d 593 (1969).

16. Soglin v. Kauffman, 295 F. Supp. 978 (1968).

17. Scott v. Alabama State Board of Education, 300 F. Supp. 163 (1969).

18. Stricklin v. Regents of University of Wisconsin, 297 F. Supp. 416 (1969).

19. Esteban v. Central Missouri State College, 415 F. 1077 (1969)

INTELLECTUAL FARMS: PUBLIC AND PRIVATE

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Intellectual farm, Intellectual farm,
Never through me shalt thou come to harm!
– Paraphrase: George Orwell, Animal Farm

On October 28, 1636, the first American college––Harvard College––was established in Boston with the charter vision of "preparing students to know the Lord more fully." This private college required of applicants for admission: "When any scholar is able to understand Tully or such like classical author extempore, and make and speak true Latin in verse and prose . . . and decline perfectly the paradigms of nouns and verbs in the Greek tongue, let him then and not before, be capable of admission into the college."

In 1693, the second college in America––William and Mary College––was chartered. In 1701, Yale was founded by Congregationalists dissatisfied with growing liberalism at Harvard. It was not until 1754 that there was an abortive effort to establish a combination private-public institution of higher education. Kings College (now Columbia) was chartered; bitter conflict between advocates of free public education and backers of private Kings College led to separation into Columbia and the University of the State of New York in 1787, at which time the state institution concerned itself with primary and secondary education and Columbia remained the only higher education institution in the state.

It was not until January 27, 1785, that a state university was established in the U. S. That was this fine university, the University of Georgia. Thus, for almost half of the U. S. history of higher education, there were only private institutions––most bearing some religious, sectarian mission.

During the last one hundred and eighty-odd years, since the establishment of the University of Georgia, there has been a decided shift of emphasis and importance from private to public higher education. State after state opened institutions, assisted in some cases by grants of public lands. Besides direct public support, the importance of state institutions was focused by the development of athletic programs for the tax-paying public––a very different emphasis from that of the original Harvard vision of "preparing students to know the Lord more fully."

During the late nineteenth and early twentieth centuries, the distinction between the private (usually church dominated) and public institution remained fairly clear. In addition, the numbers of persons involved in higher education were minute. The faculties of both public and private institutions were mostly limited to law, medicine, arts, and––dominant in private education––theology. In fact, clear distinctions among private institutions could be observed depending upon the religious denomination represented.

Higher education entered our industrial era of the twentieth century still dominated by private institutions and with distinction between public

and private approaches observable, with the clear assumption that there was something more honorable about the private institutions; but as the industrial revolution changed other phases of American life, it changed higher education. More persons were eligible for and became motivated to seek education beyond the secondary school. In the United States, formal higher education was the only available alternative. The notion of formal, institutionally provided training for trade or craft was unknown. Thus, increasing numbers of Americans embarked upon higher education. A significant impetus was the G. I. Bill following World War II, providing federal dollars for veterans to obtain formal higher education. It seems fair to conclude that, without this benefit, many currently college educated persons would not have pursued that choice.

Certain legal enlightenment was required to allow the G. I. Bill For example, in 1930 the landmark U. S. Supreme Court case of **Cochrane** v. **Louisiana State Board of Education**[1] recognized and approved expenditure of public funds for the purchase of books and supplies in private schools. Without this and other legal determinations we might not today be concerned about the instant proposition: Is there a distinction between public and private institutions?

Needless to say, the increasing number of aspirants to higher education could not be accommodated by the then dominant private institutions. Accordingly, the public ones were expanded and multiplied. At the same time, under legal authority, such as **Cochrane,** private institutions were expanded. The most significant growth, however, was in the public sector. For example, in 1970–71, public higher education enrolled 5,800,000 students, while private higher education enrolled only 2,120,000 students.

At this point, the beginning of the end of distinctions between public and private institutions was charted. On the one hand, private institutions were granted state and federal support for all institutional functions. For example, in 1963 the Higher Education Facilities Act provided federal construction money for church related colleges, among other private institutions; in **Tilton** v. **Richardson,**[2] the U. S. Supreme Court upheld that concept. On the other hand, public institutions have developed endowments from private sources of a magnitude greater, in total, than those supporting private institutions. Individuals and philanthropies are inclined to support particular objectives and programs regardless of the institutional setting. Public education gets the largest share of the pie, however. For example, in 1970–71, $28 billion was spent for higher education in the U. S.––$18.1 billion for public institutions and $9.9 billion for non-public institutions.

All Intellectuals are Equal
But Some Intellectuals are more
Equal Than Others
– Paraphrase: George Orwell, Animal Farm.

Before the law, we find, from **Cochrane** in 1930, and from **Tilton** in 1971, private institutions may constitutionally receive public funds for most institutional activities. And we know that public funds are significant factors in private institution budgets. Indeed, we have seen the plight of some of the more distinguished private universities as a result of reduced levels of federal defense spending.

With the Constitution providing rationale to assist private education with financial means, it is not surprising that private education was found to be bound by constitutional proscriptions. In recent cases considering the constitutionality of actions by private institution officials, the issue of level and significance of public support of the private institution has become an active and dominant issue in determining the character of the institution.

In the area of free speech (First Amendment), it would appear that the distinction between public and private has been abolished––or at least overlooked. For example, in **Dunbar** v. **Governing Board of the Grossment Junior College**[3] (1969), refusal by administrative officials to allow a Communist party member to debate with a

John Bircher was not entitled to the usual administrative deference when first amendment rights were at stake. Another 1969 case has held that the university can deny use of its facilities for assemblies involving outsiders only if it can show that a threat of violence exists and that the threat arises mostly from the activities and presence of the outsiders.[4] And just last week in **Healy** v. **James**, the United States Supreme Court (through Mr. Justice Powell) said:

> The wide latitude accorded by the Constitution to the freedoms of expression and association is not without its costs in terms of the risk to the maintenance of civility and an ordered society . . . Indeed, this latitude often has resulted, on the campus and elsewhere, in the infringement of the rights of others. Though we deplore the tendency of some to abuse the very constitutional privileges they invoke, and although the infringement of rights of others certainly should not be tolerated, we reaffirm this court's dedication to the principles of the Bill of Rights upon which our vigorous and free society is founded . . . The precedents of this court leave no room for the view that, because of the acknowledged need for order, First Amendment protections should apply with less force on college campuses than in the community at large. Quite to the contrary, "the vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools." The college classroom with its surrounding environs is peculiarly the "market place of ideas" and we break no new constitutional ground in reaffirming this nation's dedication to safeguarding academic freedom.

It is granted that Healy deals with a problem in a public institution. Yet the forceful language sweeps far wider, it seems to me.

To date, the private institution has not been subject to constitutional standards for admission policies. The judicial reaction has been, to date, a uniform reaction to the effect that a private university, not receiving significant public funds, but enjoying tax exemptions, does not have to afford strict procedural due process.

Nevertheless, frequently in this decade the courts have been called upon to determine the applicability of the Fourteenth Amendment on the campus--particularly in student disciplinary matters. In the early 1960s the courts began to recognize applicability of due process for the public institution. Accordingly, public universities and colleges have been required to apply a rational relationship test between the act attempted to be controlled and the rule prescribing the control most commonly associated with the due process clause.[5] The criterion which courts have considered when passing on the validity of regulations or actions of **private colleges** has been whether or not the regulation or action constituted a breach of contract by the college.[6] Consequently, the courts have looked to see whether the private college officials had the power to make the rule or take the action[7] and whether or not such power was exercised in an arbitrary or unreasonable manner.[8]

Of recent years, faculty "disciplinary" procedures have come to the courts. To date it has been assumed that, in absence of clear earned tenure, the private institution is free to terminate a faculty member without cause and without hearing. Most cases on termination of faculty appointment, however, have involved faculty members at public institutions. Two cases decided last week by the United States Supreme Court (**Board of Regents** v. **Roth** and **Perry** v. **Sindermann**) throw some doubt on the assumption made by private institutions, I submit. The two cases involve publically supported institutions; nevertheless, the Court speaks, in each case, of accrued "property rights" of a faculty member in his position. In **Roth**, the Court, through Mr. Justice Stewart, reverses the lower courts and dismisses the assistant professor of history's claim that he was deprived of his Fourteenth Amendment Rights because of infringement of free speech rights and was denied due process when the university did not advise him of the reasons for not rehiring him, saying, "The respondent surely had an abstract concern in being rehired, but he did not have a property interest sufficient to require the university authorities to give him a hearing when they declined to renew his contract of employment."

In **Sindermann,** a similar claim of a professor of government and social science was dismissed by the trial court. The Supreme Court, also through Mr. Justice Stewart, directed the trial court to hear Sindermann's evidence to determine whether a "property right" existed. Stewart said, "We agree that the respondent must be given an opportunity to prove the legitimacy of his claim of such entitlement in light of 'the policies and practices of the institution.' Proof of such a property interest would not, of course, entitle him to reinstatement. But such proof would obligate college officials to grant a hearing at his request, where he could be informed of the grounds for his nonretention and challenge their sufficiency."

When the Supreme Court classifies continued faculty appointments as "potential property rights," the private institution must take notice. However one ultimately characterizes private institutions, the Constitution will protect, through the Fourteenth Amendment, deprivations of life, liberty and **property.** Beware, private institutions! You will be best advised to follow, at least by analogy, the procedures of public institutions in discharging faculty members who might be said to have earned "property rights" in their appointments.

There is growing dissatisfaction with the doctrine which perpetuates a distinction between public and private institutions in disciplinary matters. The courts are inquiring whether the "private" institution is actually private.[9] And private universities are not all the same. There are church related, church affiliated, church established, church dominated, and a host of independently established private institutions of higher learning. One cannot assume that all private institutions will be treated alike by the courts, for questions of state interference in religious activity, among other questions, can be raised in the legal setting.

Even assuming private universities are all the same--at least the non-church-connected ones--it is suggested that they are quasi-public, responsible to the community, not private interests. Accordingly, they should be held to some degree of public responsibility.

The argument to abolish the distinction has rational basis. Besides the fact that heavy public support is received by private institutions (already discussed), there is rapidly developing public policy which should be noted. The Tax Reform Act of 1969 (born of the Wright Pattman Commmittee) has established that only those institutions which are of a "public character" can take advantage of tax exempt status and can offer tax deductibility of gifts to donors. No individual or private interest may benefit immediately or ultimately in the exempt organization. This being the case, it is difficult to identify a difference between the "stockholders" and the "beneficiaries" of the public as compared to the private institution.

One would suspect that the system of government and organization might differ, yet the corporate structure of both public and private colleges and universities is virtually identical, and it is not uncommon to find persons holding positions as trustees of both a public and a private college. In both there are non-resident trustees and resident officers, and I believe a comparison of the agenda of their board meetings and staff meetings would reveal virtually identical considerations.

One might argue that size is a distinguishing factor, and certainly there are no private colleges or universities which reach the size of an Ohio State or a Michigan State University, each with nearly 40,000 students. But in mentioning size we are talking only of degree and not of actual distinction--of characteristics and not of essence. At the University of Denver we have an enrollment of 9,000. I contend that it is just as easy to be alienated among 9,000, or even 5,000, as among 40,000. Equally important is the fact that many private institutions now exceed similar state institutions in size. Where this occurs, is there still some significant quality about the private school that distinguishes if from the state school?

The current issue of **Daedalus** (Summer 1972) is devoted to "Intellectuals and Change." In it Lipset and Dobson observe, "Intellectuals and their apprentices, University students, have never been as numerous as they are today. Given the increased

requirement of post-industrial society for university trained people and continuing high levels of innovative research, the university is needed more than ever before. While the society is becoming more dependent on intellectuals, it is also more influenced by them."[10] Granting the truth of this observation, is there a continuing need for distinctions between the public and private institutions in which the intellectuals are trained? One might argue, with David Riesman, that "the idea that men are created free and equal is both true and misleading: men are created different; they lose their social freedom and their individual autonomy in seeking to become like each other."[11] On the other hand, if Lipset and Dobson are correct that the university is the bastian of an "advisary culture" (which environment must exist for the intellectual to work), each university, regardless of public or private affiliation, harbors this critical facility for creativity, originality and destruction of tradition.

Indeed, legally, structurally, intellectually, practically, what are the distinctions between public and private institutions of higher education? Reflect with me on the final paragraph of George Orwell's **Animal Farm.**

> Twelve voices were shouting in anger, and they were all alike. No question, now, what had happened to the faces of the pigs. The creatures outside looked from pig to man, and from man to pig, and from pig to man again; but already it was impossible to say which was which.
>
> – George Orwell, **Animal Farm** (New York: Harcourt Brace & Company, 1946), p. 155.

FOOTNOTES

1. 281 US 370 (1930).
2. 91 S.Ct. 2091 (June 1971).
3. 79 Cal. Rptr. 662 (B.C. App. 1969).
4. Clemson University **Vietnam Moratorium Committee** v. **Clemson University,** 306F. Supp. 129 (1969).
5. **Goldberg** v. **Regents of University of California,** 57 Cal. Rptr. 463 (Ct. App., 1967).
6. **Carr** v. **St. John's University,** 17 App. Div. 2d 632, 231 NYS 2d 410 (1962).
7. **John Stetson University** v. **Hunt,** 88 Fla. 510, 102 So. 637 (1924).
8. **Robinson** v. **University of Miami,** 100 So. 2d 442 (Fla.Ct.App., 1958).
9. See **Carr** v. **St. John's University,** 34 Misc. 2d 319, 231 NYS 2d (1962), **Guillory** v. **Administrators of Tulane University,** 212F. Supp. 674 (E. D. La., 1962).
10. S. M. Lipset and R. B. Dobson, "The Intellectual as Critic and Rebel . . ." **Daedalus,** Summer 1972, p. 184.
11. David Riesman, et al., **The Lonely Crowd** (Garden City, New York: Doubleday), 1953, p. 349.

THE RELATIONSHIP BETWEEN THE UNIVERSITY AND LOCAL LAW ENFORCEMENT AGENCIES IN THEIR RESPONSE TO THE PROBLEM OF DRUG ABUSE ON THE CAMPUS

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Assume yourself faced with a court mandate to readmit a student known by you to be guilty of possession or sale of heroin in a dormitory on your campus because of the exclusion of the discovered heroin in a criminal or disciplinary proceeding against the student. Assume a court mandate to your university nullifying the suspension of a student after a disciplinary hearing on charges of possession of dangerous drugs by the university because that student has been convicted by a criminal court of the same offense. Assume that you are faced with the necessity to make a decision whether the university is authorized and obligated to defend a member of your counseling staff against charges that he or she has refused to supply information relative to drug use to local law enforcement authorities on the grounds that the relationship between a counselor and a student is a privileged or confidential relationship. Assume that your university and you are defendants in a court action for damages for the violation of a student's Fourth Amendment rights. And, prior to awakening from this veritable nightmare assume yourself indicted by a local grand jury on charges of maintaining a nuisance in violation of local or state statutes because of your neglect in responding to extensive drug possession, use, or sale in your dormitories.

Although some of these problems are real for the most part only in debates among attorneys interested in the legal aspects of higher education, each is close enough to reality to expose your naivete if you ignore it; and many of these problems are real and have either confronted you or are waiting to occupy a portion of your time and a measure of your concern and anxiety. In considering your response to the problem of drug abuse on the campus and the response of local law enforcement agencies vis a vis your institution, you must face the problems of search and seizure, double jeopardy, confidentiality of communications, and ultimately the responsibility of the institution to enforce local, state, and federal drug abuse laws.

If you have faced some of these questions at your institution, I am probably providing you with little additional knowledge of the applicable law. However, I shall assume that many of you have yet to experience--**hopefully** have yet to experience--the situations introduced and are concerned about your approach in responding to them. My ambition in this brief moment before you is to acquaint you with the fundamental legal principles relevant to these situations, specifically the legal principles which may give real life to my hypothetical introductory phrases, and thereby to impress upon you the necessity of obtaining legal counsel at the right moment in formulating university policy and regulations which will encompass drug usage on the campus, in creating and implementing university disciplinary procedures in cases of drug possession or usage, and in cooperating with local and state law enforcement agencies in the exercise of their jurisdiction in the enforcement of drug abuse laws.

Applicable Principles of the Law of Search and Seizure

I preface my remarks relative to the law of search and seizure by underscoring that the provisions of the Fourth Amendment to the United States Constitution protect "the right of the people to be secure in their **persons, houses, papers, and effects** against unreasonable searches and seizures . . ." (emphasis supplied)[1] The question, of course, is which searches and seizures can be characterized as reasonable when encumbered by the application of Fourth Amendment principles to the university campus? It is necessary that you be reasonably familiar with search and seizure problems or that you obtain the advice of counsel in matters related to search of dormitories and seizure of narcotic or other dangerous drugs, because these principles may apply in certain situations to deny you the right to discipline successfully or to prosecute a student for the possession, use, or sale of drugs.

Since 1961, and the decision in **Dixon** v. **Alabama State Board of Education,**[2] it is obvious to all administrators that courts have accepted seriously and earnestly the task of examining the rules and regulations of colleges and universities and the authority of university administrators vis a vis students. By comparative standards, the cases since **Dixon** concerned with constitutional safeguards have approached the law of search and seizure as applied to the campus with less enthusiasm and in less volume than cases involving First and Fourteenth Amendment protections. Certainly, however, the decisions of state and federal courts in applying the law of search and seizure to the campus over the past ten years have had as much impact upon the campus as cases involving other constitutional protections; indeed, the law of search and seizure as applied to the search of college dormitories by university administrators and local law enforcement agencies, and the disciplining of students against whom evidence is obtained as the fruit of such searches, has changes markedly in many states and appears to be changing thusly in most jurisdictions.

Until the decision in **Moore** v. **Student Affairs Committee of Troy State University,**[3] the principal law in this area came from state courts in New York and California. In 1961, in **People** v. **Kelley,**[4] city police, acting upon a tip from an informer that stolen goods were in a dormitory room occupied by the defendant, contacted the school dean and master of the dormitory and were told by the master that he had the power to enter rooms for purposes of inspections and in cases of emergency.[5] The master and the police officers entered the defendant's room and confiscated contraband found in the room. The California Court determined that there was no violation of the student's Fourth Amendment rights and further found that the police were justified in relying upon the master's representation of his right to permit entry. The Kelley case first established the school's right as an implicit right reserved to the school to enable it properly to enforce disciplinary rules and regulations on its campus and specifically in dormitories. The Kelley case determined both an implicit right of university authorities to inspect and enter dormitory rooms in the enforcement of campus rules and regulations and the validity of a contract right of entry. Several years after the Kelley case, the Court of Appeal of New York determined in **People** v. **Overton**[6] that the principal of a junior high school could consent to a search of a student's locker by police officials consistent with Fourth Amendment protections since the principal had a right to search the locker and could therefore give police permission to do so. The Moore case, decided in 1968, continued to sustain the right of school officials to conduct such searches but began the alteration of legal justification of such searches. In the Moore case, local law enforcement officials, after receiving information that marijuana was present in a dormitory room, requested authority from the dean of men to search certain dorm rooms. Consent was given, and dorm rooms were searched by university officials accompanied by police and state narcotic agents. Upon the discovery of marijuana in Moore's room, Moore was indefinitely suspended by the university. He challenged his suspension contending that the marijuana was obtained through an unconstitutional search of his dorm room. The district court upheld the suspension, holding that

the university's regulation permitting entry into dormitory rooms by school officials was necessary to maintain order and discipline on the campus and that this right of the university was sufficiently consistent with the public interest to override any Fourth Amendment rights of the student. The court specifically recognized that students do not waive Fourth Amendment rights upon matriculation nor do they confer upon school officials the discretion of unlimited entry; rather, the court determined that this right enures to and may be exercised by the university where it has reasonable cause to believe that the dormitory room is being used for some purpose inconsistent with the enforcement of disciplinary rules and regulations.

The incident of the search of Moore's room led to the first important change in search and seizure law as applied to university dormitories. In the same search that led to the action against Moore, the rooms of two other students were searched and criminal convictions for illegal possession of marijuana were obtained against two students. In **Piazzola** v. **Watkins,**[7] the convicted students petitioned for a writ of Habeas Corpus, claiming that the criminal convictions had been founded upon illegally seized evidence, in violation of their Fourth Amendment right. The criminal convictions were overturned, the court holding that the evidence was indeed illegally seized where a police search of the room was made without a valid search warrant. The Piazzola case established that a student who occupies a dormitory room is entitled to Fourth Amendment protections as they apply to criminal and quasi-criminal searches and seizures. The Piazzola case represents the first court decision holding that, although evidence obtained through a warrantless search of a student's dormitory room by local law enforcement authorities may be introduced in university disciplinary proceedings leading to the suspension or expulsion of the student, that evidence may not be introduced in a criminal prosecution of the student for possession of drugs. This distinction is at the moment critical; the suit in **Moore** was against school officials for disciplinary action against the student, whereas in the Piazzola case the constitutional arguments were raised as a defense in a criminal prosecution.

The second court decision consistent with Piazzola came from the Pennsylvania Supreme Court in **Commonwealth** v. **McCloskey.**[8] In the McCloskey case, a narcotics agent, a state police officer, and two university officials entered the dormitory room of a Bucknell university student armed with a warrant secured for the purpose of searching the room. There was conflicting testimony whether the officials identified themselves before entering. After entry, McCloskey was told of the purpose of the visit and was shown the warrant. A search of the room disclosed five pounds of marijuana, and McCloskey was convicted of possession of marijuana. On appeal, McCloskey contended that the search of his room was improper and the marijuana obtained should have been held inadmissable as evidence against him. In reversing his conviction, the Pennsylvania Supreme Court determined for the first time to my knowledge that a dormitory room is analogous to an apartment or hotel room. The court went on to find that the Fourth Amendment prohibitions against unreasonable searches and seizures require that, before a police official enters a private residence to conduct a search or make an arrest, he must identify himself and state the purpose of his presence, except when exigent circumstances justify the failure to give such notice. The McCloskey case stands, therefore, as the second case invalidating searches of dormitory rooms by local law enforcement officials without **valid** search warrants and criminal search procedures, where evidence is used to substantiate a criminal conviction. The decisions in **Piazzola** and **McCloskey** have established at least in the Fifth Circuit and in the State of Pennsylvania that the authority of university officials, whether implicit or by contract, to enter and inspect dormitory rooms does not confer upon them the authority to conduct criminal searches nor an authority to consent to the search for the student or to delegate to local law enforcement agencies the officials' right of entry into the dormitory room.

Assuming arguendo that a student's dormitory room is akin to an apartment or a motel room—the point which is still a matter of some debate in many jurisdictions and which must be resolved prior to the **Piazzola** and **McCloskey** decisions' becoming the settled law of the United

States--the decisions in **Piazzola** and **McCloskey** are quite consistent with the application of the law of search and seizure to hotel rooms and apartment dwellings. It is beyond cavil that a landlord who may have the right to inspect premises for waste or matters of maintenance does not possess a right of criminal search and cannot consent for a tenant to a warrantless search of the tenant's room or apartment by local police authorities. Similarly, motel clerks are denied such authority, thus constraining local police officials to utilize contraband seized as a result of searches of motel rooms only where searches and seizures were conducted pursuant to valid warrants or justified by the legal principles allowing warrantless criminal searches.[9]

Very recently, the Federal District Court for the Northern District of Texas held in **Caldwell** v. **Cannady**[10] that disciplinary proceedings against a high school student for illegal possession or marijuana were invalid where the disciplining of the students was based upon a search of their automobile by law enforcement officials without a search warrant. The Cannady case established for the first time the possibility that evidence obtained by a warrantless search of a student's dormitory room or automobile by local police officers may be held inadmissible to support disciplinary action by the university. Prior to the decision in the Cannady case, such evidence, although inadmissible in criminal proceedings, was held admissible in university disciplinary proceedings because of the characterization of those proceedings as civil rather than criminal or quasi-criminal. Such a characterization or justification has in itself been questioned by many legal authorities and has apparently been called into question in the Cannady case with some adverse impact upon university administration.

Still undecided by the courts, and apparently still supportable, is the use by university officials of evidence obtained by them through their own, albeit warrantless searches of students' dormitory rooms in university disciplinary proceedings against such students; no court to my knowledge has yet invalidated such procedures, notwithstanding the suppression of such evidence in university disciplinary proceedings under the Cannady decision where such a warrantless search is made by local law enforcement authorities.[11]

It should be noted that the decisions I have discussed do not comprise the settled law applicable to all jurisdictions. These decisions do, however, establish a trend in court decisions to require university officials to allow a search of dorm rooms by local law enforcement authorities only upon their obtaining of a valid search warrant and utilization of proper criminal or quasi-criminal search procedures. You, as college officials, still appear to possess the authority to search dormitory rooms of students and to utilize evidence obtained from your search of those rooms against them in university disciplinary proceedings, or perhaps even in criminal prosecution. The trend established by **Cannady** must, however, be watched closely by legal counsel.

As an aside in closing I note that the U. S. Supreme Court decided in **Bivens** v. **Six Unknown Named Agents of the Federal Bureau of Narcotics**[12] that an individual may have a right of suit for damages against public officials who violated his Fourth Amendment rights acting under the color of their authority, notwithstanding the absence of federal or state statutory authority for the recovery of damages in such cases.[13]

Jurisdiction of Local Law Enforcement Authorities and Campus Security Officers

The applicable principles of the law of search and seizure, discussed above, make it necessary for any university administrator to understand fully the jurisdiction and authority of local law enforcement officials and university security officers. Many university security officers are empowered by statute with the authority and jurisdiction of state or local law enforcement officers.[14] Where university security officers are vested with the authority of state or local law enforcement officials, it is my opinion that those officers should not conduct a criminal search of a

student's dormitory room or vehicle except pursuant to valid search warrants and in compliance with valid criminal search procedures.

Double Jeopardy: University Disciplinary Proceedings and Criminal Proceedings Against Students for the Possession, Use, or Sale of Drugs

In its widely quoted general order on judicial standards of procedures and substance in review of student discipline in tax supported institutions of higher education, the United States District Court for the Western District of Missouri, **en banc,** rejected efforts to analogize student disciplinary proceedings to criminal proceedings.

> In the case of irrevocable expulsion for misconduct, the process is not punitive or deterrent in the criminal law sense, but the process is rather the determination that the student is unqualified to continue as a member of the educational community . . . While the expelled student may suffer damaging effects, sometimes irreparable to his education, social, and economic future, he or she may not be imprisoned, fined, disenfranchised, or subjected to probationary supervision.

This position is contested by many legal authorities who assert that suspension or expulsion from institutions of higher learning may indeed be a penalty more serious than penalties imposed pursuant to criminal convictions for the violation of many statutes.[15] However, this distinction has continued as a legal basis for allowing a university to effectuate disciplinary proceedings against a student, notwithstanding criminal prosecution of the student by local or state courts for the same offense. The refusal by courts to apply the principles of double jeopardy to university disciplinary proceedings and simultaneous criminal proceedings allows the university to take disciplinary action against a student for possession, use, or sale of drugs on the campus and allows local law enforcement officials to take criminal action against the student for the same offense.

Although I find some force in the arguments which aver that the seriousness of suspension or expulsion from a university lends great force to the argument that the principles of double jeopardy should apply to preclude such suspension or expulsion in the face of simultaneous criminal prosecution, I nevertheless find it a pragmatic necessity to conclude that university authorities should continue to possess the authority to effectuate disciplinary action against a student notwithstanding criminal charges against such student for the same offense. Where a student is found to be possessing, using, or selling dangerous drugs in a dormitory, criminal charges against him may continue for some great length of time prior to final adjudication. While the criminal adjudicatory process is continuing, the student would, without authority vested in university officials to discipline him, i.e., to suspend or expell him, continue toward graduation. Indeed, by the time of the ultimate exhausting of criminal appeals, it is not unreasonable to predict that in many cases the student would have obtained his degree from the institution, thus making the question of university response to his offense moot.[16] However, it is a decided possibility that courts may at some time in the future apply the principles of double jeopardy to preclude simultaneous criminal and university disciplinary prosecution against students for a single act of possession, use, or sale of drugs on the campus. The United States Supreme Court, in **Waller** v. **Florida,**[17] held that where the defendant had been charged with and convicted for the violation of two St. Petersburg city ordinances, subsequent state charges against him for grand larceny, based upon the same acts, violated the principles of double jeopardy and constituted a bar to prosecution by the State of Florida. The Supreme Court in the Waller case recognized at least one instance where criminal prosecution by the state and one of its political subdivisions or agencies violated the principles of double jeopardy; and extension of the Waller case could preclude punitive action by a state or municipality and, concurrently, by a state agency, i.e., a state university based upon the same act. At the moment, the Waller case can be distinguished from the situation of interests now under discussion.

It should be noted that where a student is subjected to university disciplinary proceedings,

and where it is necessary for him to disclose information in his defense against the suspension or expulsion, he is prone to assert that such disclosure would violate his Fifth Amendment rights if utilized in subsequent criminal prosecution to support his conviction. It is my opinion that an objection to such use could be raised as a defense in the criminal prosecution under the authority of **Garrity** v. **State of New Jersey.**[18, 19]

Confidentiality of Communications Concerning Drug Usage on the Campus

A very real problem for many university administrators with primary responsibility for student affairs and arising out of the use of drugs on campus relates to the confidentiality of communications between a student and a university counselor, psychologist, physician, or other official concerning his use of those drugs. In most states, the law does recognize certain privileges of confidentiality relating to certain communications. Generally these privileges extend to communications between an attorney and his client, a physician and his patient, a clergyman and his parishioner, and in some states between a psychologist and his patient, or a social worker/special agency counselor and his client.[20] It is important for university administrators to obtain the advice of counsel relative to those communications accorded statutory privilege or confidentiality and the terms under which that confidentiality or privilege obtains.[21] In most states there are important exceptions involving communications regarding drugs. The Uniform Narcotic Drug Act which is the law in many jurisdictions, specifically provides, **e.g.,** in New York that communications made to physicians are not confidential within the meaning of the provision of the Civil Practice Act relating to confidential communications between physicians and patients, and further that information communicated to physicians in an attempt to unlawfully procure narcotic drugs or unlawfully to procure the administration of such a drug are not to be deemed a privileged communication.[22]

Without unnecessarily belaboring a discussion of privileged communications, it is sufficient to conclude that it is quite probable in most jurisdictions that university officials, including most importantly university counselors, residence hall advisors, and similar personnel, are not vested with a privilege of communication regarding drug usage reported to them by students coming to them for counseling. I recognize obviously, through my own experience at Florida State University, and through my readings of the professional literature, the reluctance of professional counsellors to accept a role as enforcer of the laws relating to drug abuse and their insistence that such a role interferes with their counselling role and would lead to a deterioration of their relationship with students. It must be recognized, however, that such personnel may be deemed agents of the institution and thereby, their knowledge or information may be imputed to the university. Thus, such personnel must recognize that they may be faced with the obligation under local or state law to report instances of drug use to health or law enforcement agencies, and may well be faced with the necessity of testifying in court proceedings against students concerning their knowledge of the student's drug possession or usage.

Civil or Criminal Liability of University Officials for Student Drug Usage

The issue of civil liability of university officials for injury resulting from drug abuse by students on the university campus for the most part remains undetermined by the courts. A recent decision by a trial level court in the State of Ohio, **Hegel** v. **Langsam,** dismissed the complaint of a father against the University of Cincinnati complaining that the university had permitted his daughter to succumb to a variety of temptations, including drug use, while she was matriculating at the university. The court's opinion, consistent with the continuing cessation of application of the doctrine of in loco parentis as applied to institutions of higher education, held that the university was an institution for the advancement

of knowledge and not a boarding school or nursery school. The court held that there was no requirement of the law to the court's knowledge placing upon a university or its employees any duty to regulate the private lives of its students, to control their comings and goings, and to supervise their associations. On the basis of this reasoning, the court refused to apply the provisions of the Ohio statutes making it a crime to contribute to the delinquency of a minor against university officials. Since most states, including Florida, have statutes making it a crime to contribute to the delinquency of a minor, this decision is heartening to college administrators. However, the Hegel decision is a lower court decision, not binding upon the courts of any jurisdiction outside the State of Ohio, and importantly, does not speak directly to the possible liability of universities where they have knowledge that a student is a regular user of drugs and fail to take proper action. Hopefully, the courts will continue to recognize that universities are not staffed or financed adequately to provide the kind of custodial care that might be expected in order to fully protect students from their own possible misadventures. Certainly, it would appear to be unrealistic to charge a university with knowledge that a student is a drug user, and, in addition, that on a particular occasion, the student might inflict an injury upon himself as a result of the use of drugs. Regarding injuries to other students as a result of drug usage by a particular student, it would appear the university would be liable in tort only where the university is aware of drug usage by a particular student and, therefore, might be held reasonably to foresee or perceive risk to other students. This principle of tort liability might well be brought into play where university counselling or residence hall staff personnel are aware of such substantial drug usage by a particular student and might be led to expect or foresee injury to other students as a result of such usage.[23] It is especially important to recognize that the right of universities to compel students to reside in dormitories, recently upheld in **Pratz** v. **Louisiana Polytechnic Institute,** 316 F. Supp. 872, appeal dismissed 401 U. S. 952, affirmed 401 U. S. 1004 (1971), makes it not unreasonable to conclude that universities will bear a consequent obligation to control dangerous activities, including dangerous drug usage, in those dormitories.

Lest you believe that there is no possibility that a university official might be subject to civil or criminal prosecution as a result of drug usage in a dormitory or approved student residential facility, several such charges have indeed been brought. In **People** v. **Schrieber**[24] a New York court sustained a criminal nuisance conviction against a college student whose apartment was being used in his absence by his friends for a pot party at the time of a police raid. The basis for the conviction of Schrieber was that he had knowingly acquiesced in the use of his apartment as a gathering place for the use of marijuana. It would appear that the principle of the Schrieber case could be applied to a university's knowing acquiescence in the use of dormitory or other approved housing facility for the use of marijuana. I have been informed of charges similar to those levied in **Schrieber** being levied against an associate dean of student affairs at a university within the State University System of New York.

Florida law provides that any dwelling, or in fact any place whatever, which is resorted to by narcotic drug addicts for the purpose of using narcotic drugs or which is used for the illegal keeping or sale of the same, should be deemed a public nuisance. Florida law further provides that the keeping of a public nuisance or the aiding or abetting of another in keeping a public nuisance is a violation of state law.[25]

Because of the necessity of the establishing of intent as a prerequisite to conviction under most criminal statutes, it would appear that some affirmative act of acquiescence by the university would be a necessary condition precedent to liability of the university for drug usage in its dormitories. However, it is necessary that university officials obtain legal counsel relative to the provisions of state and federal law relating to the maintenance of nuisances, or the hindering of prosecution, or the failure to provide information to authorities. Again, it is doubtful that mere failures to report information about drug abuses to local law enforcement authorities without further

participation by the unviersity in the act of possession, use or sale of drugs by students on the campus would constitute violations of criminal facilitation or misprison statutes. Generally, such statutes require knowledge by the defendants that the offender has committed the offense, a failure on the part of the defendant to notify the authorities, and importantly, affirmative steps by the defendant to conceal the crime.

I believe it necessary merely to advise that college administrators should be aware of the risk of the violations of drug abuse statutes by students and should be cautious to counterbalance their sympathy for student drug users with their possible liability for suppression or withholding of evidence pertaining to such usage which might lead to criminal convictions.[26]

The possible liabilities of universities which might result from their knowledge of drug abuse in dormitories or approved housing facilities make it appropriate that the university consider provisions in its housing contracts to allow the expulsion from dormitories of students who are found to be in possession of dangerous drugs. I would suggest that it is possible to enforce a contractual provision requiring a student to terminate his dormitory occupancy even absent a hearing, and that such could be done while at the same time continuing to accord the student his right to enrollment in the university.

Conclusion

The legal complexities encumbering the university's response to the problem of drug abuse on its campus make cooperation between the university and local law enforcement agencies mandatory. Such complexities also mandate that the university, with advice from its counsel, review the provisions of local and state law, and the case law, as it applies to those factors present in the university's response to the drug abuse problem on campus. Admittedly, compliance with recent trends in the law relating to the enforcement of drug laws as they apply to the campus and the enforcement of university rules and regulations necessarily promulgated for the welfare of the university place an additional legalistic burden upon university administrators and university resources. However, if the laws regarding drug abuse have any meaning, and if the university has any legitimate interest in the welfare of its students, its community, and in the promotion of its educational goals, it must examine this burden and effect procedures for adequate response to the problem and disseminate to its law enforcement officers, counsellors, dormitory personnel, physicians, and other members of its faculty, staff, and students those principles which it must apply in approaching the problem of drug abuse on the campus.

FOOTNOTES

1. U. S. Constitution, Fourth Amendment.

2. 186 F. Supp. 945 (M.D. Ala. 1960).

3. 284 F. Supp. 725 (M.D. Ala. 1968).

4. 195 Cal. App. 2d 72, 62 Cal. Rptr. 177 (Cal. App. 1961).

5. It is a common provision in many university housing contracts that the university reserves the right to inspect dormitory rooms in the enforcement of university rules and regulations and for the purposes of general inspection and maintenance.

6. 20 N. Y. 2d 729, 283 N. Y. S. 2d 22 (1967).

7. 316 F. Supp. 624 (M.D. Ala.1970); (442 F. 2d 284); (5th Cir. 1971).

8. 272 A. 2d 217 (Pa. 1970).

9. **Chapman** v. **U. S.,** 365 U. S. 610; **Stoner** v. **California** 376 U. S. 383; **U. S.** v. **Jeffers,** 342 U. S. 48.

10. 40 **Law Week** 2667 (N.D. Texas 1972).

11. See **Keene** v. **Rogers,** 316 F. Supp. 217 (D. Me. 1970), where the District Court did affirm the admissibility of marijuana found through a search of a federal Job Corps Center student's belongings by an administrative officer of the center for the purpose of determining whether there had been a breach of an institutional rule. The Keene case specifically sidestepped the issue of whether or not the exclusionary rule applies in college disciplinary proceedings and appears to support the admissibility of evidence, even in criminal proceedings, where that evidence is discovered by school officials through their own search of a student's room pursuant to their authority to enter and inspect for the purpose of enforcing disciplinary or general university rules and regulations.

12. 403 U. S. 388 (1971).

13. Florida Statutes, Sec. 404.021 (1971) allow law enforcement officials to arrest without a warrant any person when the law enforcement official has probable cause to believe that person is violating the provisions of the Florida Drug Abuse Law relative to the possession of cannabis. This attorney is of the opinion that the Statute is of questionable validity in light of the court decisions discussed herein.

14. See, e.g., Florida Statutes, Sec. 239.58 (added by General Session Laws 72-263, 1972 Session).

15. See **Soglin** v. **Kauffman,** 295 F. Supp. 978 (1968); **Van Alystyne the student as university resident,** 45 **Denver Law Journal** 582, 595 (1968).

16. In **Grossner** v. **Trustees of Columbia University,** 287 F. Supp. 535 (1968), the Court noted that it is desirable to have stays of administrative proceedings where the individual involved faces criminal charges arising from the same events. It is my opinion, as dicussed in the text, that such could seriously jeopardize the response of the university to incidents of drug use on its campus. But, **cf** also **Silver** v. **McCamey,** 221 F. 2d. 873 (1955); **United States** v. **Parrott,** 258 F. Supp. 196 (1965).

17. 387 U. S. 398 (1970).

18. 385 U. S. 593 (1967).

19. Florida law, provides that where a student is charged by competent local law enforcement authorities with possession of narcotic drugs, a university, junior college, or secondary school in the State of Florida in which he is enrolled must hold a hearing to determine whether the student should be suspended pending a determination of his guilt on the criminal charge. Although the laws of Florida do not mandate suspension prior to conviction, the statutes do mandate expulsion of that student for one year if he is convicted by a court of competent jurisdiction on the criminal charge. **Florida Statutes,** Sec. 239.582 (1971), Sec. 232.26 (2), added by Florida General Laws 72–381, 1972 General Session.

20. Florida law prescribes no affirmative duty of university physicians, nurses, and other clinical personnel to report drug abuse cases to public authorities, under most circumstances. However, Florida Statutes, Sec. 790.24, does require a physician, nurse, or employee thereof, who treats or is requested to treat one suffering from "a gunshot wound or other **wound indicating violence**" to report such to the sheriff's department. Although this Statute, to my knowledge, has received no judicial interpretation, it would seem to intend the reporting of a suicide attempt through a massive drug overdose. Moreover, even if this Statute is not applicable to such a suicide attempt involving a drug overdose, still, the reason for not reporting the incident––to allow counselling, etc.––seems less important where the patient has attempted suicide. The justification for this seems logically that some sort of rehabilitative confinement could well be necessary for a person attempting suicide through a drug overdose. Obviously, however, it is difficult to define those overdoses which are accidental and those which are incident to a suicide attempt. In either case, however, a broad reading of Sec. 790.24 indicates that such an overdose would be considered "a wound indicating violence."

    The rules and regulations of the State of Florida are also applicable to certain cases which might involve the use of drugs, although, again, such cases could be the exception rather than the general experience. To the extent to which a communicable disease or condition of a type specified in Sec. 10D–3.02 of the Rules and Regulations are present in a drug user, reports containing all information concerning the disease or condition and the case or carrier are required to be made to the Division of Health by the attending practitioner. Thus, a student administering heroin with unclean needles might contract hepatitis. In such a case, the physician must report all information concerning the disease or condition and the case or carrier to the County Health Unit Director. It does not appear that such reports given to local health unit directors are appropriate for communication to law enforcement authorities. First, this is not the purpose of such reports; the reports are made for the purpose of protection of the health of the general community, specifically, to prevent the spread of communicable diseases. Moreover, Florida Statutes, Sec. 381.231 (4) labels such reports "confidential" and able to be made public "only when necessary to public health." This lack of affirmative duty does not, of course, dispell the effect of those statutes which require physicians, nurses, and employees thereof to appear as witnesses, and to respond to subpoenas. Indeed, physicians, nurses, and their employees and the evidence they possess or control are subject to various statutes regarding the duty of a witness, subpoena procedures, and control of evidence. In this regard, Florida recognizes no physician/patient privilege either in statutory or common law, except as it extends to psychiatrists and their patients.

Florida Law does recognize a psychiatrist/patient privilege respecting confidential communications. Florida Statutes, Sec. 90.242. The Florida Statutes also recognize that communication between a clergyman and his parishioner is confidential and privileged. Florida Statutes, Sec. 90.241.

Quite applicable to instances of drug abuse, Florida statutory law recognizes a privilege of communications between a clinical psychologist licensed to practice clinical psychology within the State of Florida and his patient and also recognizes the confidentiality of communications between personnel of Florida licensed drug abuse treatment and education centers and drug addicts voluntarily submitting to the care of those centers. Florida Statutes 490.32 and Sec. 397.096.

21. For example, the privileges discussed hereinabove under Florida law do not obtain to create a privilege of communications where a defendant in a criminal prosecution introduces his mental condition as a defense.

22. See, e.g., New York Public Health Law, Sec. 3304, subdivision 2,**et seq.**

23. See, e.g., **Beaudoin** v. **Lykes Brothers Steamship Company, Inc.** 348 U. S. 336 (1955); **Abbot** v. **New York Public Library,** 263 N. Y. App. Div. 314, 32 N. Y. S. 2d 963 (1942); **Ferrara** v. **Board of Education of the City of New York,** 212 N. Y. S. 2d 615 (1961).

24. 310 N. Y. S. 2d 551 (1970).

25. Florida Statutes, Sec. 398.14 and Sec. 823.10 (1971).

    The City of Tallahassee municipal ordinances were amended in 1970 to include the illegal possession and use of narcotics in the definition of a disorderly house and a disorderly person as one who frequents such a place. Thus, one allowing drug usage on his premises may be held under Section 23–23.1 of the Tallahassee Municipal Code guilty of maintaining a disorderly house in violation of city ordinances.

26. For an exhaustive discussion of applicable New York law and an excellent discussion of the law on this point in general, see the Report of the Twelvth Annual Convention, National Association of College and University Attorneys, **The College Counsel** (1972), "Legal Problems Related to the use of Dangerous Drugs on Campus," Edward C. Kalaidjian.

CONSTITUTIONAL RIGHTS AND NON–RENEWAL OF FACULTY CONTRACTS––REFRACTIONS AND REFLECTIONS

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In the age of the Great Stereopticon,[1] where the exaltation of communication has issued in an incessance of chatter, it is wise for even the unangelic among us to note Professor Morris Cohen's warning that "not all who rave on are divinely inspired."[2] Accordingly, I shall strive for divinity by observing, though not scrupulously, George Eliot's assurance that "blessed is the man who having nothing much to say refrains from giving wordy evidence of the fact."

Lamenting the strabismus of lawyers, academicians, and school administrators attempting to divine the law on the subject, my dear friend and esteemed colleague, Rivers Buford, last year at this meeting cited to a veritable gallimaufry of disparate appellate decisions and expressed the hope that the Supreme Court would soon resolve the conflict among circuits in regards to the untenured teacher's entitlement, **vel non,** to due process procedures prior to non-renewal of employment.[3]

It has. On June 29, 1972, the Court issued decisions in two cases––**The Board of Regents of State Colleges** v. **Roth**[4] and **Perry** v. **Sindermann**[5]––wherein the Fourteenth Amendment's guarantee of procedural due process––including a hearing, notice of charges or cause, etcetera, prior to non-renewal––was held to be applicable to every terminated or non-renewed teacher who has "a legitimate claim of entitlement" to re-employment.[6] Students of Tautology or Pleonasm are urged to contain their criticism of my analysis, or the Court's, pending my obfuscation of an otherwise confused subject.

Chief Justice Burger, concurring in the decisions, explained the holding in **Roth** and **Sindermann** as follows:

> The Court holds today only that a State-employed teacher who has a right to re-employment under state law, arising from either an express or implied contract, has, in turn, a right guaranteed by the Fourteenth Amendment to some form of prior administrative or academic hearing on the cause for the nonrenewal of his contract.[7]

Before we leap to embrace the distinguished Chief Justice's attractively uncomplicated definition of the majority's decision, let us first recollect the state of the law on June 28, 1972, and then microtome Mr. Justice Stewart's opinions for the majority in **Roth** and **Sindermann.**

In his June 1971 paper, Mr. Buford surveyed five areas of conflict among the circuits regarding entitlement to the full panoply of due process procedures prior to termination or non-renewal of contract.[8] Subsequent to Mr. Buford's plea for deliverance from the chaos, the Court of Appeals

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for the Seventh Circuit issued its **Roth** decision,[9] the First Circuit held in **McEnteggart** v. **Cataldo**[10] that reasons for non-renewal are owed to a non-tenured teacher, Willie Mays was traded to the Mets, and crab grass utterly destroyed my already tenuous hold on composure.

Then, in **Roth** and **Sindermann**, the Supreme Court reiterated and elaborated its view that dismissal by a state institution of an employee, even a teacher, or non-renewal of his contract to thwart the exercise of First Amendment rights or to punish him for such exercise is constitutionally impermissible. The Court's finer focus, though, was procedural. In the absence of tenure, is a teacher whose contract is not to be renewed entitled to the full panoply of due process procedures prior to non-renewal? Mr. Roth, employed for one year and not rehired, was told that he was not entitled to a summary judgment against the Board of Regents on the issue. Mr. Sindermann, employed year-to-year for a decade under policies suggestive of a relationship approximating tenure, was told that he did not have to suffer an adverse summary judgment on the issue.

The more nominalistic or rule-skeptical among us might conclude that the cases' import is that the Court does not have a penchant for summary judgments and was determined to make this known. The Chief Justice's aforementioned analysis, explicitly designed to qualify such litigation for abstention by the federal courts, says that Roth had no "right to re-employment under state law arising from either an express or implied contract," but that Mr. Sindermann did and that this constitutes the Q.E.D. of the litigation.

With the greatest of respect for the Chief Justice, I wonder. The Chief Justice interprets the case as follows: If under state law a teacher has a contract, then he has "a right to re-employment," and that right vests him with a right to some form of prior hearing. Mr. Justice Stewart's majority opinion argues: If the teacher suffers violation of "liberty" or of a "property" interest, then he has a "legitimate claim to entitlement" to re-employment, and he is thereby vested with a right to a hearing.

The Chief Justice's interpretation omits reference to such derogations of "liberty" as are not obviously property losses; and more will be made of this presently. Also, one must wonder why, if a man has "a right to re-employment"--as distinguished, presumably, from a "legitimate claim to entitlement" to re-employment--a hearing is necessary. But it may be best, under the circumstances, to resist the seemingly irresistible invitation to logic-chop or to split semantic hairs.

In the **Roth** case the district court granted Roth a summary judgment on the procedural due process issue (holding apart the issue of First Amendment detriment), and the court of appeals affirmed. The Supreme Court reversed. (See, 40 LW 5080.)

The Court directed us to "the **nature** of the interest at stake,"[11] rather than the relative weights of the interests at stake, asking whether Mr. Roth's liberty or property were imperiled and thus protectable. Mr. Justice Stewart devoted Section II of the opinion to a consideration of "liberty" and concluded that the refusal of the state to rehire Roth or to offer reasons to him did not thereby impute to him any delinquency, did not stigmatize him, did not sully his "good name, reputation, honor or integrity."[12] Indeed, the Court noted that the district court made an "assumption" that non-renewal is creative of professional difficulties for the subject teacher, and the Supreme Court then proceeded to assert that "the record contains no support for these assumptions."[13]

Let me make three critical observations. First, it is difficult to see how the record arising from a summary judgment could be expected to support the district court's "assumptions." Hence my earlier emphasis upon the reversal of a **summary** judgment. Second, one is almost constrained to ask, in light of the first point: "Suppose that the record **had** supported the district court's assumptions?" Third, and by way of justification for my statement of the preceding two points, it is

not clear whether the Supreme Court ruled that as a matter of law no claim is established if the plaintiff-teacher is rendered "somewhat less attractive" by the state's action of non-renewal, or whether it made a finding of fact (either limited to the record or not) that no "adverse effect . . . upon career interests is effected by non-renewal."[14]

The Court then defined Roth's property rights by the terms of his employment, and these terms provided for termination on a certain date. Thus, Roth had "no possible claim of entitlement to re-employment."[15] Accrued interests in specific benefits are protected, **40 LW 5082**; mere desires or naked expectations are not.

The Court concluded by holding that "the summary judgment . . . should not have been granted, since" Roth "has not shown that he was deprived of liberty or property . . .," and the cause was remanded.

The dissenters (Justices Douglas, Brennan and Marshall) urged that non-renewal "can be a blemish that turns into a permanent scar and effectively limits" chances of re-employment[16] and reminded the majority that "the right to work for a living in the common occupations of the community" is within the penumbra of the Fourteenth Amendment's protection.[17]

In the **Sindermann** case the district court granted summary judgment for the state; the court of appeals reversed, holding that Sindermann had a right to prove "expectancy" of continued employment as predicate for entitlement to due process procedures. (The court of appeals also reversed the summary judgment on grounds that non-renewal based on plaintiff's exercise of free speech would, if proved, be impermissible.) First, the Court held that "lack of a contractual or tenure right to re-employment" does not entitle the district court to preclude "full exploration" of plaintiff's claim that non-renewal of his employment was founded upon his exercise of First Amendment rights. The state may not use this as a foundation for its non-renewal of employment.[18]

Second, the Court held that plaintiff's allegations "do raise a genuine issue as to his interest in continued employment." The Court held that plaintiff's allegations of the operation of rules and policies constituting a simulacrum of tenure entitle him to prove them in court and, if proved, entitle him to a court order directing the state college to afford Sindermann hearing and notice prior to non-renewal, as it would a tenured teacher.[19]

In passing, the Court disagreed, it said, that "a mere subjective 'expectancy' " is sufficient interest to prompt such protection; rather, the plaintiff must prove that "the policies and practices of the institution" have created an implicit tenure system.[20] I am uncertain whether this is semantic hair-splitting--since presumably the Fifth Circuit had meant that an "expectancy" to be actionable had to be warranted by something--or is, instead, a major transplantation of focus from the teacher to the institution.

The Court did not discuss, as it had in **Roth**, the "liberty" problem. The case was disposed of, rather, on Mr. Sindermann's property interest in employment by dint of the implicit tenure system. The **Roth** dissenters here dissented in part, declaring that Sindermann was entitled to a summary judgment.

In case you have failed to follow or remember my running commentary on the two cases, I shall summarize the lessons taught us by the decisions. We know that in non-renewal cases a teacher in a state school is entitled to the procedural due process protections of hearing and notice if his employment was tantamount to tenure, **a fortiori** if he had tenure or a continuing contract. We do not know whether, as a **matter of law,** non-renewal does not threaten liberty sufficiently to evoke due process protections or whether, on the other hand, the court majority doubts that non-renewal does, as a **matter of fact,** adversely affect professional status at all or sufficiently to threaten liberty. (It is this latter interpretation, denied by what could be termed the exclusive particularity of the Chief Justice's reading of the decision, which could prove to be of compelling importance in the context of a crucial diminution of academic

employment opportunities, not to mention the indelibility and seeming ubiquity of employment records.)

Then, too, in **Roth** the First Amendment issue was not before the Court; and in **Sindermann** the Court did not disagree with the Fifth Circuit's command that one alleging "punishment for . . . exercise of constitutional rights" is entitled, upon petition, to a hearing at which the state shall go forward "to show error." Indeed, the Supreme Court did not comment upon this rule uttered by the Fifth Circuit Court.

Thus, the only party obviously **not** entitled to a hearing prior to non-renewal is the teacher who has no tenure, no continuing contract, no property interest assertable, no warranted fear of professional detriment, and who fails or refuses to assert that his non-renewal is based on "his exercise of constitutional rights or otherwise constitutes some actionable wrong."[21]

Such a stoic, if not embalmed, condition appears to define, albeit negatively, "a legitimate claim of entitlement" to re-employment and thus to procedural due process. May every school board lawyer or college counsel have such a plaintiff! Frankly, I have not seen such a creature and would not anticipate an early sighting.

The real distinctions among cases brought by real teachers against real defendants will relate, I suspect, to **burdens of proof** rather than to entitlement to procedural due process--unless the record can be made to show, unblinkably, that non-renewability does derogate professional status sufficiently to evoke "liberty" considerations.

The real burden, from the standpoint of administrators and hiring faculties, is that, once hired, a teacher may not be **not employed** (to phrase it inelegantly) without a shown "cause"--unless that teacher is willing to sit back on his Ph.D. and espouse the Emotivist philosophy by saying only that he would on the whole really rather be employed than unemployed. The likelihood of such an event is slight, to say the least.

FOOTNOTES

1. Weaver, The Great Stereopticon
2. Cohen, Reason and Law (The Free Press).
3. Higher Education: The Law and Individual Rights and Responsibilities (University of Georgia 1971) 51. See, 40 LW 5080, nt. 6.
4. 40 LW 5079.
5. 40 LW 4087.
6. **Roth,** at 5082; see, also, **Sindermann,** at 5090.
7. **Sinderman, Ibid.** (Burger, C. J., concurring).
8. Higher Education, **op cit,** at 50–51.
9. 446 F.2d 806; see, also, **Cook County** v. **Byrd** (7 Cir. 1972) 456 F.2d 862.
10. 451 F.2d 1109. Cf. 430 F.2d 945, re: the provision of reasons for non-hiring.
11. 40 LW at 5080–5081.
12. **Id** 5081.
13. **Id** at 5082, nt. 13.
14. **Ibid.**
15. 40 LW at 5083.
16. **Id** at 5085.
17. **Id** at 5086.
18. 40 LW at 5088–5089.
19. **Id** at 5089.
20. **Id** at 5090.
21. 430 F.2d 939.

COLLECTIVE BARGAINING IN AMERICAN HIGHER EDUCATION: THE IMMEDIATE PROSPECTS

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We may very well be standing on the brink of what could be the most significant overall development in American higher education within living memory. I am referring to the growing trend toward professional unionism with the concomitant utilization of collective bargaining techniques adapted from the labor movement in the negotiation of faculty contracts. This is no fantasy; it is, rather, a reflection on current conditions which may presage future prospects. Unions are in education now.[1] They represent teachers in the secondary schools;[2] they are negotiating on behalf of non-professional and sub-faculty employees in higher education;[3] and, in some cases, they already speak for the faculty itself.[4] According to a recent estimate, formal faculty bargaining arrangements now exist in more than thirty four-year and one hundred community colleges.[5] Each of you, therefore, may be faced with the prospect of sitting across the table from leaders of a faculty union, represented perhaps by an attorney or an economist who learned his trade with the longshoremen or the teamsters,[6] to hammer out an agreement covering salary, tenure, grievance procedures, publishing standards, academic freedom, and sabbatical standards.

This being a real possibility, it is important that you understand this development and what it may mean to your institution. To do this, it will be necessary to examine some of the factors, legal and otherwise, affecting the growth of collective bargaining in public and private institutions as well as the special problems which the application of labor relations concepts to higher education present.

Private Institutions

Federal law plays an important role in the employment relations of private institutions of higher learning. Since the passage of the National Labor Relations Act of 1935,[7] our national labor policy has guaranteed private sector employees the right of self-organization. The statute reflects the basic policy judgment that labor strife can be greatly reduced by guaranteeing employees, by law, the right to deal with employers as equals in the determination of terms and conditions of employment.[8] To secure this goal, the act protected the employee's right to join a union and shielded him from employer interference with union activity. It also imposed upon employers an affirmative duty to bargain with the appropriate representative of the employees and created the machinery through which such representation could be determined. Thus, collective bargaining became and remains the keystone of our national private sector labor policy.[9] In 1951, however, in

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* The author expresses his appreciation to Marcus Calhoun for his assistance in the preparation of this paper.

the exercise of its discretionary powers the National Labor Relations Board declined jurisdiction over labor disputes at private non-profit educational institutions.[10] This had the effect of removing federal statutory protections for union activity at private institutions and leaving such protections to state or local governments. In eight states legislation was expressly drafted or interpreted to cover employees of private educational institutions.[11] New impetus was given to the collective bargaining process, however, when the National Labor Relations Board reversed precedent and started assuming jurisdiction over private sector disputes. The big breakthrough came in the 1970 case of Cornell University[12] in which the board reversed its decision in the 1951 Columbia University[13] case and asserted its jurisdiction over those private, non-profit colleges and universities whose operations have a substantial effect on commerce. Although this case dealt with non-professional employees, it clearly laid the foundations for subsequent board action involving faculty. Such action was not long in coming. In April of 1971 the board decided cases[14] involving the faculty of the C. W. Post and Brooklyn Centers of Long Island University. Again the board found jurisdiction under the commerce clause, and this time it went on to hold that since professional personnel have the usual incidents of an employer-employee relationship, they are entitled to the benefits of the National Labor Relations Act. Since that time decisions have been reached in cases involving Fordham University,[15] the University of Detroit,[16] Manhattan College,[17] and Adelphi University[18]—to name a few cases which clearly establish the jurisdiction of the labor board and begin to deal with the complicated issues which higher education brings to the labor front.

Public Institutions

Professional employees at public institutions have not received the benefits of federal labor relations law. The National Labor Relations Act specifically excludes from the scope of its protection the employees of "any State or political subdivision thereof."[19] Consequently, the development of labor relations policy for these employees was left to the individual states.

The Right to Organize

One notion used by states to limit the right of public employee organization was the waiver concept enunciated in 1892 by Justice Holmes,[20] who was then sitting on the Massachusetts Supreme Court. His view was that while the Constitution did guarantee employees freedom of speech, it did not guarantee that they would remain on the public payroll. In the words of Holmes:

> The petitioner may have a constitutional right to talk politics, but he has no constitutional right to be a policeman. There are few employments for hire in which the servant does not agree to suspend his constitutional rights of free speech as well as of idleness by the implied terms of his contract. The servant cannot complain, as he takes the employment on the terms which are offered him.[21]

This thinking served as the legal foundation for some state statutes[22] which attempted expressly to prohibit public employee organization. State courts have also adopted this reasoning as the basis for upholding local ordinances prohibiting the unionization of municipal employees.[23]

In the 1960s the entire concept of waiver fell into constitutional disrepute with the Supreme Court noting in such cases as **Sherbert** v. **Verner**[24] that the placing of conditions upon benefits and privileges could constitute an abridgement of First Amendment rights. Then in **Keyishian** v. **Board of Regents**[25] and **Pickering** v. **Board of Education**[26] the court expressly held that a state could not demand relinquishment of First Amendment freedoms as a condition of employment as a public school teacher.

The jump from freedom of speech to the right to join a union is not as great as might first appear. In 1958 freedom of association had itself reached

constitutional status as a First Amendment right in the case of **NAACP** v. **Alabama.**[27] In that case the Supreme Court held that it could permit abridgement of that right "only after concluding that the reasons advanced for (such abridgement) . . . were constitutionally sufficient to justify its possible deterrent effect upon such freedom."[28] Clearly this right of association is not absolute, but must be balanced against the state interest in levying the regulation. Recent cases applying this test to the right of public employees to join unions seem to indicate clearly that the final balance will be stuck in favor of the right of association. In **McLaughlin** v. **Tilendis,**[29] the Seventh Circuit Court of Appeals found that the due process clause of the Constitution guaranteed the right of school teachers to form and join a labor union and that no paramount state interest had been shown which warranted the limiting of this right. Similar results have been reached in other cases,[30] and while the Supreme Court has never directly so held, it seems that public employees, including **teachers** and **professors,** do have a constitutional right to organize. This constitutional right has been reinforced in a number of states by statutes, executive orders and opinions of the attorney general.[31]

Collective Bargaining

Of course, the right to organize does not carry with it the full range of action available to private sector unions. An example is the question of the right to bargain. Some state courts have refused to recognize such a right on the grounds that in state government the employer-employee relationship is a legislative matter which may not be delegated.[32] This logic is buttressed by the further argument that many of the normal subjects of bargaining are within the range of authority which only the state legislature may determine.[33] The extent to which this position is valid will certainly vary from state to state, but on the whole the argument seems to have little force in relation to higher education, since most of the areas of primary concern--working conditions, tenure promotions, grievance procedures--lie within the discretion of administrative officials.[34]

Many states have treated the issue of collective bargaining on a non-constitutional basis, holding in effect that the state can limit the power of its agencies to enter binding contracts[35] and that nothing in the Constitution entitles one to have an agreement with one who does not want it.[36] Some states have even gone so far as to hold that express statutory authorization is required to validate even an agreement voluntarily made.[37] At least one court has held, however, that a unilateral adoption of policy in the face of a request for employee consultation can be a violation of First Amendment rights,[38] while other states have held that in the absence of statutory prohibition a public agency may enter into a legally enforceable contract with its employees.[39] Today at least thirty-four states have adopted policies of collective bargaining or meeting and conferring for teachers.[40] Not all of these states, however, apply this policy to employees of state institutions of higher education.

The Right to Strike

A final critical distinction between public and private employees lies in the right to strike. Much of the opposition to public unions can be attributed to the fear of disruption of government services by the strikes which will accompany such activity. But, while the strike is a valid economic weapon in the arsenal of private sector unions, and while it is true that such tactics will continue to be employed in labor disputes, the proper functioning of the collective bargaining process tends to avoid rather than foster these damaging events. Most states, however, have expressly prohibited such strikes,[41] and these prohibitions have uniformly withstood constitutional attack. In the recent case of **United Federation of Postal Workers** v. **Blount,**[42] a three judge district court dealt with the right to strike issue, holding that such a right was not constitutionally guaranteed. The court noted that at common law no employee, public or private, enjoyed such a right and that the scope of such protection where it now exists is wholly statutory. Having thus decided that the right was not fundamental in the constitutional sense, the court disposed of the clerk's equal protection argument by holding that

such discrimination was not unconstitutional if it was done on a rational basis.[43]

Despite these laws and their apparent validity and despite the further fact that the common law unquestionably denied public employees the right to strike, many such strikes have in fact taken place.[44] Their effect has tended to blur the once distinct lines between public and private sector employees. Also, Hawaii and Pennsylvania have afforded public employees the right to strike.

The Future

What is the future of public employee labor relations? The general movement seems to be toward treating public employees the same as private. Indeed the jurisdictional standards for private non-profit schools just established in the Cornell University[45] case and later promulgated by official order[46] are cast in terms of impact upon commerce and therefore apply more fully to public schools which presently enroll the great majority of the nation's college students and are therefore generally larger in terms of plant, employees, and activities affecting commerce.[47]

One difference, of course, remains the impediment caused by Section 2(2) of The National Labor Relations Act, which as noted earlier excludes from the statutory definition of employer ". . . any State or political subdivision thereof." Several techniques for removing this impediment have been attempted. A direct approach which would simply delete the exclusion from the act has been urged.[48] As a matter of fact, the House Special Subcommittee on Labor recently held a series of hearings on bills that would federalize public employee labor relations. Alternatively, it has been argued that a state university is not a political subdivision of the state.[49] This type of logic presents a difficult problem, but in its resolution may lie the key to any immediate extension of the **Cornell** doctrine to state universities.

Whether an entity is a political subdivision depends in large part upon the particular legislative scheme, and the rules of statutory construction employed in its interpretation.[50] The Labor Board does not allow a simple declaration by a state legislature that an organization is a public agency in and of itself to exclude the organization from the coverage of the NLRA[51] but requires a clear showing that the employer functions as a unit of self government.

As you well know, all institutions commonly known as state universities or state supported universities do not bear identical relationships with the states to which they belong. Many private institutions, moreover, receive a large amount of direct and indirect support from government sources. Further confusion is heaped upon this already cloudy picture when it is noted that state courts have found various quasi-governmental agencies to be political subdivisions for one purpose but not for another.[52] The Labor Board itself has read one such state statute so as to find a local school board not an employer within Section 2(2),[53] but in another case which predated even **Columbia** the board did hold that a state university was a political subdivision[54]—although this decision seems to have been subsequently ignored.[55] In any case, this also remains a great unsolved riddle, the answer to which may well play a role in the extension of Labor Board jurisdiction to state universities.

The final question we must confront is: "What will all of this mean to public institutions of higher learning?" At least a partial answer can be gleaned from the recent experience in the private sector.

First there will be organization. The growing size of our universities and the accompanying depersonalization of faculty-administration relations show a striking analogy to the conditions within the industrial revolution which sparked the broader labor movement in this country. As Professor Archibald Cox has pointed out: "When the United States transformed from a nation of farmers, artisans and shopkeepers to a community of wage earners, individual workers lost the power to bargain effectively with their employers."[56] So too as our colleges grow and broaden and as an increased flow of bright young professors clamors for a chance to teach, the position of the individual faculty member is diluted; and his once powerful voice fades to a whisper. Of course, the

process will take place more rapidly in some places than in others. In the schools where a strong faculty senate has a meaningful voice in the important matters of employment (and some commentators suggest that there is a direct correlation between such faculty authority and general academic quality),[57] further organization will be slow in coming--just as companies with farsighted labor policies were better able to withstand early efforts at unionization. Conversely then, the schools most autocratically run--those in which the individual professor is most likely to feel as though his destiny is wholly beyond his control--are likely to be more conducive to the growth of concerted activity.

Of course, much of this organization has already begun. The three major organizations to which higher education faculty belong now list in excess of 125,000 members.[58] These organizations, however, have thus far proceeded down different paths so that their combined force has not yet been felt.[59] This divergent philosophy of action is also quite analogous to the national labor movement, and an interesting by-product of the overall development will be the competition between the different organizations for members.

After the organization there will be collective bargaining, and here major new problems will emerge as the differences between professionals and industrial workers become more evident. Collective bargaining is essentially an adversary proceeding designed to resolve conflicts arising out of an employment relationship. The process is essentially bilateral encompassing both the negotiations and the continuing relationship of the parties after an agreement is reached; indeed many commentators[60] and several decisions of the Supreme Court[61] have viewed the collective bargaining agreement as having more the nature of a constitution for industrial self government than as a simple contract because of this dimension of continued utilization.

Before this process can even begin it will be necessary to determine exactly who the parties to the agreement will be. In the normal situation this requires what is known as a unit determination, which is primarily a matter of identifying the group of employees who share the proper community of interest with respect to the terms and conditions of their employment. In the case of institutions of higher learning, and especially where state agencies are involved, a new problem presents itself--that of picking a proper management representative. Management authority normally means the power to enter binding agreements in matters relating to terms and conditions of employment. The proper level of this power will, in certain cases, be difficult to isolate. It may rest with university administration, with a state board of regents, or even with the state legislature itself.

The proper employee group may also prove difficult to designate. In the normal case this administrative detail is resolved in one of two ways, either by recognition or certification. In the first case the parties simply agree to the proper unit configuration and bargaining agent; but if the employer refuses to deal on this basis or if some rival organization challenges the recognition, the certification procedure must be used. In that situation formal representation hearings will be held before the administrative body charged with this responsibility. In the private sector it is the Labor Relations Board; states with public employee relations acts often provide similar bodies with similar responsibilities for public employees. These organizations will either grow in importance with the advance of public unionism or perish as the act is amended or the board expands its jurisdiction by other means.

In several of the recent cases to which I referred earlier, the board has begun to hammer out the guidelines for future unit determination. In April of 1971 the Labor Board in the Long Island University[62] cases faced for the first time the question of appropriate unit determination in regard to university teaching staff. There the union sought a unit of all professional employees who were engaged in student instruction at the university's C. W. Post Center, including all full-time faculty, adjunct professionals, librarians, counselors, and laboratory technicians. The employer, on the other hand, sought to segregate these personnel into at least two units with one for full-time faculty and one or more for all the other categories involved.

In making its decision the board took a careful look at the requirements of Section 2(12) of the act and the functions performed by each group involved. The primary arguments made by the university with respect to full-time faculty were that because of their advisory power in academic and administrative matters they were supervisors within the meaning of Section 2(11) of the act and that they were managerial employees and thus entitled to separate representation. Despite these arguments, and the acknowledgement by the board that they were dealing with an uncharted area, the board found that full-time faculty members were professional employees within the meaning of Section 2(12) of the act and that they were therefore entitled to all the benefits of collective bargaining. Adjunct faculty was then considered and included in the same unit despite the fact that university regulations do not grant them the same voice in school policy. In support of this conclusion, the board cited well settled principles that disparity of benefits and the fact of other employment are not sufficient distinctions to exclude part-time employees. Professional librarians were also included because their function was considered so closely related to teaching as to produce a community of interest with the faculty. Research assistants were included on much the same basis. Deans, department chairmen, and division chairmen were excluded from the unit as supervisors within the meaning of Section 2(11) because of their executive responsibility. Laboratory personnel, on the other hand, were omitted because the board found the nature of their work to be nondiscretionary and therefore not professional in the sense of Section 2(12) and also because such personnel did not enjoy faculty privileges or responsibilities. What is perhaps the nicest line, however, is that drawn between various types of counselors. Here the board included guidance counselors because they ". . . are required to have advanced knowledge and are performing the intellectual and varied functions contemplated in the definition of professional employees in Section 2(12) of the Act." Academic and admissions counselors, on the other hand, were excluded because ". . . they are not required to have knowledge of the advanced type and are not performing the intellectual and varied tasks contemplated in Section 2(12) of the Act." In such hazy and difficult distinctions lie the guidelines for the future.

Subsequent decisions have looked closely at the specific responsibilities of the classes of employees being considered. In the Fordham University[63] case department chairmen were included because it was determined that their administrative responsibilities were largely advisory. The Fordham Law School, however, was deemed a separate unit because of the independent nature of its operations. In the Manhattan College[64] case, on the other hand, professional athletic coaches were "in" while ROTC instructors were "out." These problems of unit determination are complex, and their resolution will be difficult; but clearly the shape of the bargaining unit will play a major role in determining the direction in which the subsequent bargaining will move.

Special problems will be encountered in regard to unit determination in the multi-campus institution. While the board seems somewhat reluctant to fragment,[65] private units have thus far been both local[66] and unitary.[67] The board decision in the companion Long Island University cases[68] might demonstrate a preference for local units, but there is no indication that the issue was ever raised. The multi-unit state university systems will also pose special problems of this type.[69]

Problems will also be faced in determining the scope of collective bargaining in the field of education. What exactly is included within the ambit of wages, hours, and terms and conditions of employment? How will academic freedom be negotiated? What of peer evaluation or the merit system? How can a formula be devised which will uniformly provide for the proper ratio of salary to hours taught at all levels? And what of grievance arbitration? In the recent experience of City University of New York, it was reported that one key point in the whole procedure involved the reconciliation of union demands for binding arbitration with the university's insistence upon retention of its prerogative in matters of academic judgment.[70] The somewhat ambiguous solution to the problem at which they arrived attempts to distinguish types of issues and define the limits of the availability of arbitration for each type.[71] This represents one approach, perhaps the best; but

certainly others will be tried as the problems presented by this new phenomenon are recognized and efforts are made to resolve them.

That, then, is a thumbnail overview of the immediate future prospects for unionization in private and public institutions of higher learning. The coming of collective bargaining and other incidents of normal labor management relations are also your challenge, for difficult as the normal processes are, this new wave will present a new breed of problems for which you must begin to prepare solutions now so that when they are in fact upon you you will by such anticipation be ready to meet their varied demands.

FOOTNOTES

1. See Wollett, **The Status and Trends of Collective Negotiations for Faculty in Higher Education,** 1971 **Wisc. L. Rev.** 2, 6 (hereinafter cited as Wollett).

2. Nearly 60 percent of all school districts surveyed in 1970–71 had substantive collective bargaining agreements with their teachers. See Blum, **Teachers Unions and Associations** 106 (1969).

3. Wollett, supra note 1 at 5 and 16.

4. See **Id.** at 6–7.

5. Garbarino, Faculty Unionism from Theory to Practice, 11 Industrial Relations _____ (1972).

6. In the recent baseball players' strike, for example, the team owners found themselves dealing with an economist whose background was with the steelworkers.

7. Act of July 5, 1935, Sec. 1–13, 49 Stat. 449.

8. Beaird, **Labor Relations Policy for Public Employees: A Legal Perspective,** 4 **Ga. L. Rev.** 110, 114 (1969) (hereinafter cited as Beaird).

9. See **e.g.** H.R. Doc. No. 380, 57th Cong., 1st Sess., 844–45.

10. Trustees of Columbia University, 97 N.L.R.B. 72, 29 L.R.R.M. 1098 (1951).

11. Those states are Colorado, Connecticut, Hawaii, Massachusetts, Michigan, Minnesota, New York, and Wisconsin.

12. 183 **N.L.R.B.** 41 (1970).

13. 97 **N.L.R.B.** 424 (1951).

14. **C. W. Post Center of Long Island University,** 189 **N.L.R.B.** 109 (1971); **Long Island University (Brooklyn Center),** 189 **N.L.R.B.** 110 (1971).

15. 193 **N.L.R.B.** 23 (1971).

16. 78 **L.R.R.M.** 1273 (1971).

17. 79 **L.R.R.M.** 1253 (1971).

18. 79 **L.R.R.M.** 1545 (1971).

19. 29 **U.S.C.** Sec. 152(2) (1970).

20. **McAuliffe** v. **Mayor of New Bedford,** 155 Mass. 216, 29 N.E. 517 (1892).

21. **Id.** at 220, 29 N. E. at 517.

22. See **e.g. Ala. Code,** tit. 55, Sec. 317(2) (1958); **NC. Gen. Stat.,** Sec. 95–97–99 (1959).

23. See **CIO** v. **City of Dalls,** 198 SW 2d 143 (Tex. Cir. App. 1946).

24. 374 U. S. 398 (1963).

25. 385 U. S. 589 (1967).

26. 391 U. S. 563 (1968).

27. 357 U. S. 449 (1958).

28. **Id.** at 461.

29. 398 F.2d 287 (7th Cir., 1968).

30. See **e.g. AFSCME** v. **Woodward,** 406 F.2d 137 (8th Cir., 1969); **Atkins** v. **City of Charlotte,** 296 F.Supp. 1068 (W.D.N.C., 1969).

31. U. S. Department of Labor, Summary of State Policy Regulations for Public Sector Labor Relations (1971).

32. See **e.g. Fellows** v. **Latronica,** 151 Colo. 300, 377 P.2d 547 (1962).

33. **Id.** at 305, 377 P.2d at 550.

34. See Beaird, supra note 7 at 124.

35. See **Atkins** v. **City of Charlotte,** supra note 33.

36. **Id.**

37. See **e.g. Weakley Cty. Man. Elec. Sys.** v. **Vick,** 43 Tenn. App. 524, 309 S.W. 2d 792 (1957).

38. **Indianapolis Education Ass'n** v. **Lewallen,** 305 GERR. EL (S.D.Ind. 1969) (unreported).

39. **Norwalk Teachers Ass'n** v. **Board of Education,** 138 Conn. 269, 83 A.2d 482 (1951).

40. U. S. Department of Labor, Summary of State Policy Regulations for Public Sector Labor Relations (1971).

41. Beaird, supra at 128 and 101.

42. 325 F.Supp. 879 (D.D.C. 1971) aff'd 92 Sup. Ct. 80 (1971).

43. **Id.** at 883.

44. Beaird, supra note 7 at 126 and 89.

45. 183 **N.L.R.B.** 41 (1970).

46. Jurisdictional Standard Applicable to Nonprofit Colleges and Universities, 35 Fed. Reg. 18370 (1970).

47. See **American Council on Education, A Fact Book on Higher Education.**

48. Hearings of the House Subcommittee on Labor.

49. See Comment, **NLRB Jurisdiction over Private Colleges and Universities––Toward Elimination of the Good Works Exclusion,** 44 **Temp. L.Q.** 410, 415 (1971).

50. **Id.**

51. **E.g.** Natural Gas Utility Dist. 167 **N.L.R.B.** 691 (1967).

52. Compare **Muse** v. **Prescott School Dist.,** 233 Ark. 789, 349 SW2d 329 (1961) with **Ray** v. **Cobb County Board of Education,** 110 Ga. App. 258, 138 SE2d 392 (1969).

53. International Brotherhood of Electrical Workers, 87 **N.L.R.B.** 99 (1949).

54. University of Michigan Board of Regents, No 7–RC–1208 (NLRB 1951).

55. Comment, supra note 51 at 416.

56. **A. Cox. Law and the National Labor Policy** 1 (1960).

57. Finkin, **Collective Bargaining and University Government,** 1971 **Wisc. L. Rev.** 128 N14 (hereinafter cited as Finkin).

58. Wollett, supra note 1 at 6–7.

59. Finkin, supra note 57 at 129.

60. See **e.g.** Cox, **Reflections upon Labor Arbitration,** 72 **Harv. L. Rev.** 1482 (1959).

61. **E.g., United Steelworkers of America** v. **American Mfg. Co.,** 363 U. S. 564 (1960); **United Steelworkers of America** v. **Warrior & Gulf Navigation Co.,** 363 U. S. 574 (1960); **United Steelworkers of America** v. **Enterprise Wheel & Car. Corp.,** 363 U. S. 593 (1960).

62. See note 14 supra.

63. See note 15 supra.

64. See note 16 supra.

65. Livingston & Christensen, **State and Federal Regulation of Collective Negotiations in Higher Education,** 1971 **Wisc. L. Rev.** 91, 98.

66. Finkin, supra note 57 at 132 and 31–32.

67. **Id.** at 132 and 28–30.

68. See note 14 supra.

69. Wollett, supra note 1 at 23–24.

70. Mintz, **The CUNY Experience,** 1971 **Wisc. L. Rev.** 112, 119.

71. **Id.**

LEGAL RESPONSIBILITY OF ADMINISTRATORS

(Higher Education)

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During the last half dozen years, that field of education law which has to do with the rights of students has expanded to an almost startling degree. The same can be said about the expansion in the area of rights of teachers.

It is to a large extent the expansion in these two areas which has made of education law a truly new specialty which has prompted renewed study on a broad front. One very simple example will serve to spotlight the assertion. I began to teach education law about 1943 at Northwestern University, Chicago and Evanston, Illinois. At that time, the subject, if it was taught at all at a university, was taught only in the graduate division of the school of education. The law schools of the country did not list such a course. At the present time, however, there are at least fifty law schools that are offering courses in school law to those preparing for professional careers as attorneys. I teach a seminar in the subject at our law school, and almost all schools of education are giving attention to the subject matter of education law.

The relative newness of many of the developments in such areas as student rights and teacher rights has left many questions unanswered and presents much conflict in thinking between courts--even among those at the appellate level. For quick illustration, I present just a few examples. The due process procedural right of a high school student to cross-examine a fellow student who gave adverse testimony in a serious disciplinary action against him is not finally and conclusively settled. The right of a probationary teacher who is given notice of termination just short of gaining tenure to receive a statement of reasons was not recognized by all federal appellate courts; and even among those federal appellate courts that do feel a teacher has a right to reasons, the courts are not fully in accord as to what reasons will validly support the decision to dismiss without granting tenure.

Just within the last few days the United States Supreme Court has handed down a decision in two cases which will undoubtedly settle the conflict to some extent; but I have not been able, as of this date, to get copies of the decisions and I will not, therefore, comment on them.[1] Even in the area of substantive rights, courts are not always in agreement. To cite but one example, the hair and dress code cases establish this fact.

Even though uncertainties of the type I have indicated do exist in the area of pupil and teacher rights there are still a great number of courts that have, within the last six to ten years, dealt with such subject matter. In many cases, the conflict of law is between state jurisdictions and federal appeals courts. However, there is much that is definite within a particular state or a particular federal appeals court circuit. One assigned to talk in the area of student and teacher rights, as I have often been asked to do, is able to cite a great many cases and analyze the philosophy of a great many courts.

A great deal of the area that I have been asked to discuss today presents a much more difficult problem. The questions are there, but the answers are far from certain. I will address myself first to

the question of possible legal liability of administrators when campuses are disrupted or closed by protesters.

Let us first think about some of the questions of tort liability if there is campus disturbance. Is an administrator legally liable for injury to persons or property for failure to call police in the same way, for example, that he would be liable if he failed to close off a classroom if he had knowledge that the floor in such a room had been damaged by fire to such an extent that it would be unsafe? Can an administrator be held liable for allegedly unsound administrative judgment about the timing and manner of quelling a disorder?

The effort has been made to base causes of action on such theories. You understand that there is no way that parties can be stopped from initiating suits. I will, however, express the optimistic opinion that the chances of such a tort action succeeding are remote if school officials heed a few simple rules.

I feel sure that courts will exhibit an awareness that the administrator must be allowed considerable discretion in respect to the timing of a decision to call the police. The first sign of disorder or even of some minor violence should not impose the automatic duty to call in the police. Administrators may logically feel that campus support for the use of police at the early stage of a building occupation would be lacking. Courts should not be blind to the fact that many campus groups will feel that the reasonable thing to do would be to allow a little time for negotiations for a peaceful discontinuance of the disturbance. Neither should courts be blind to the fact that the administrator is not imprudent who recognizes that the too early call for police assistance may heighten the possibility of injury to some students.

Of course, a time will be reached when a court can be persuaded that an administrator had waited too long to summon police assistance. The point I am making, however, is that the court will recognize that the administrator must be allowed a reasonable leeway for discretion. One bit of advice suggests itself here. It would be wise for administrators to sit down ahead of time and draw up some kind of a plan to guide them in connection with a decision to call the police.

Here we can get some help by analogy from the attitude of the courts as to whether there has been negligent supervision at the high school and elementary school level. The courts recognize at such levels that the schools are not equipped to give foolproof supervision and are often induced to find supervision adequate if they can see that school personnel have sat down in advance and drawn up a plan for the most prudent use of the manpower available to supervise.

I, therefore, submit to you that courts will note the efforts made to plan for the use of police in connection with campus disorders. There are indeed measures which may be taken to reduce the possibility that a call for police is not improperly timed and to reduce the possibility that if police are called their activities will not get out of hand.

Advance planning should include representation from all the agencies that might be involved--campus and security police, city or state or county law enforcement officers, the National Guard, and the fire department.

The planning session should answer a number of specific questions, including the following:

1. At what point will police assistance be requested?

2. Will police be called as soon as a building is illegally occupied or only after a degree of violence or destruction? At what degree of violence or destruction?

University administrators should attend briefings at which the police are instructed by their superior officers concerning the conduct of operations. If arrests are to be made police should be instructed to take violators from the buildings to police vans by the shortest possible route in order to minimize the possibility of confrontations with sympathizers.

The recognition that administrators should be allowed considerable discretion in drawing up plans to deal with campus disruption and disorders displays an understanding that when we are talking about the problem of group activism we are dealing with something entirely different from an individual violation of the law. This fact has been recognized by a number of legal authorities.

At a meeting of the American Law Institute in May 1968, Erwin Griswold, the present Solicitor General of the United States and for many years prior to that Dean of the Harvard Law School, stated, "When society operates with only normal aberrations the law can be made to bring the non-conformists into compliance. But when there is mass resistance to the law, we need other tools, other sanctions . . . if organized society is to survive." Along the same lines, reorganizing the room for use of discretion in dealing with mass activism, Professor Sax of Michigan Law School in discussing civil disobedience in the September 1968 issue of **Saturday Review** states, "The greatest danger of all is that excessive focusing on the legality of situations tends to blind one to the obligation to make humane judgments."

One situation where it would appear to be quite safe for the administrator to delay calling in law enforcement authorities is that in which the demonstration is improper **merely** because of the selection of time and place which shows a disregard for the rights of others to learn in an atmosphere of relative calm. The words of Professor Sax of Michigan Law School may have meaning for courts and induce them to recognize that administrators should be allowed a wide area of discretion in the handling of mass activism. Professor Sax reminds that much of mass activism is a maneuver designed to inform the general public and appropriate public officials of a grievance in a way which could not be achieved through other sources of communication open to the particular group. He suggests that when the only real problem is the inappropriateness of time and place and if social value is clearly discernible in the protest, some delay in prosecution may be indicated in order to allow the demonstrators to reap publicity value for their cause. But Professor Sax is quick to utter a guideline which ought not to be forgotten by administrators. He states that "the public need not accommodate itself to perpetual obstruction even when no violence is involved." And, of course, the public cannot be expected to accommodate itself to an endless number of new issues raised at frequent intervals.

I return again to my statement that if a little intelligent planning is done there is little likelihood that many courts will find administrators responsible for damages in tort in actions growing out of allegations of negligence for not calling in police or seeking injunctions. The point, of course, can be reached when a court will recognize that the situation gave the administrator no further discretion, but that condition will not likely arise if the planning and thinking I have suggested is done in advance.

Causes of action have been filed against administrators on the tort theory that a decision to close a school has damaged students by depriving the student of a right to learn. For reasons I have already discussed, if planning is adequate I would feel that most courts would not find the requisite degree of culpability. And if the facts so indicate, courts can agree that it would have been imprudent to keep the campus open because of the heightened danger to many. Furthermore, in this day when very frequently no cognizance is taken of a considerable number of voluntary class absences it may be hard to establish in a tort action any great degree of harm from a closing that is not of long duration.

There is, however, another tool available today that has been used in an effort to recover against administrators that have closed campuses affected by student disorder. The tool is 42 U.S.C. Section 1983--The Civil Rights Act. That section provides for a **civil** action for deprivation of rights. It states:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any state or territory, subjects, or causes to be

> subjected, any citizen of the United States or other person with the jurisdiction thereof, to the deprivation of any rights, privileges or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

This Congressional Act was the basis for an action brought in federal court against the President, Chancellor, and Regent of the University of Wisconsin. That university shut down classes during the student uprising protesting the Cambodia campaign. The plaintiffs alleged an invasion of First Amendment rights to study and discuss together. They pointed out the great respect the United States Supreme Court has shown to academic freedom and alleged that their First Amendment right to academic freedom to think, study, and discuss was interfered with by the closing down of classes. The plaintiffs also alleged a denial of equal protection of the laws--hence a violation of Fourteenth Amendment rights. This allegation was grounded upon the assertion that the administrator-defendants disregarded and did not enforce University regulations.

In a decision[2] of April 13, 1972, as yet not officially reported, a three judge panel of the Seventh Circuit Appeals Court decided by two to one that there was no violation of 42 U.S.C. Section 1983. In regard to the infringement of First Amendments rights, the court pointed out that there was no allegation that university officials silenced students. The court could find nothing in the First Amendment which guaranteed students a right to discuss in the classroom. The court stated:

> To call upon courts to delineate the specific form in which academic inquiry must occur would itself, place an impermissible burden on academic freedom. Respect for the autonomy of educational institutions has resulted in focusing judicial protection of first amendment rights primarily on extracurricular speech and assembly. Courts have generally hesitated to review purely academic matters, as in cases involving administrative decisions about curriculum, where the danger of infringing upon the authority of the institution to determine educational programs was greatest.

The court went on to say:

> These considerations are especially compelling in the instant case. We are at a loss to ascertain the standards by which Federal Courts are to judge the right to continue normal educational activities. We find no guidance in the first amendment itself, or in the cases construing it.

The court also found no violation of the Fourteenth Amendment, equal protection of the law clause. It pointed out that the decision to terminate classes applied to **all** students equally. The court stated that the allegation of the plaintiffs that university officials were not following statements of philosophy found in the catalogue or bulletin (such as the goal of the university, sifting and winnowing facts for truth) means at most that the University has reneged on a contract, not that there has been a violation of First Amendment rights. The court pointed out that, since there was no constitutional violation, the plaintiffs at most would have only a contract action and that they would have to process such action in a state court.

The dissenting judge accused the majority of assuming, without question, that the action of the defendants was **reasonable** and of not going into the matter of determining whether the decision was arbitrary. He drew attention to the fact that the plaintiffs had alleged the decision was arbitrary. If the decision was arbitrary, the dissenter felt, the United States Supreme Court philosophy would support a finding of violation of Section 1983. He drew on analogy with the famous Tinker[3] case and said:

> If a dissident student has a constitutionally protected right to wear, in non-disruptive circumstances, a black armband into a classroom, as a peaceful expression of his anti-war views, then students who wish merely to pursue their customary educational opportunities also possess a constitutional right to enter the classroom and express their ideas

of normal educational pursuit, free from arbitrary interference by school officials.

A federal district court judge in the Eastern District of Missouri in **Belk** v. **Chancellor of Washington University**[4] agreed with the dissenter and recognized the vital nexus between the rights of students to engage in normal educational functions and their constitutional rights of free speech, assembly, and academic freedom.

Although, strictly speaking, the title of this talk--"Liability of Administrators"--would not seem to carry me into a discussion of whether a university has breached a contract if it closes during student disorders I will make a brief comment. Actions of the sort have been brought. Some courts have recognized that full performance is excused on the grounds that violence and disorder make normal academic work impossible (analogous to a campus destroyed by fire). Some administrators have attempted to avoid the problem by having members of the faculty available for consultation and setting up special exam schedules. But a New York lower court held that students were entitled to "business as usual." Even if a student wins in a contract action, it is likely many courts would restrict him to a pro rata share of tuition.

I would like now to turn my attention to administrator liability in connection with the suppression of student newspapers, handbills, and leaflets. If there is improper suppression, there is an invasion of First Amendment rights, and an action could be brought against an administrator under 42 U.S.C. Section 1983.

Goldberg v. **Regents of the University of California**[5] makes it clear that students can be disciplined for using filthy language over loud speakers on the grounds of time and place being inappropriate. The courts feel that the deliberate use before a **captive audience** of filthy language that offends sensibilities may appropriately be made the subject of discipline without violating First Amendment rights. (But to avoid a due process problem, clear regulations should be set forth, as I will mention later.)

More difficult problems arise in connection with efforts to discipline for material included in student newspapers and handbills. If the newspaper is wholly supported by the University, the problem is not difficult. The University has the right of the normal publisher. It can halt publication and distribution if it desires to do so.

Putting aside the fully university-supported newspaper, one question that does arise is whether school administrators can require students to submit the publication for **prior** approval to determine whether the content will interfere with the proper and orderly operations and discipline of the school or will cause violence or disorder or constitute an invasion of the rights of others.

A regulation of this type was sustained by the powerful Second Circuit Court of Appeals in **Eisner** v. **Stanford**[6] in a case involving high school students, but the court specifically noted that it likely would not approve such regulation at the college level.

Furthermore, the court pointed out that if the regulation was to stand at the high school level in order to avoid procedural due process problems the regulation must make clear that the policy was directed at substantial distribution. Also, a definite person must be established to whom the material is to be submitted for approval; and, most important, a definite brief period must be set, within which the review will take place and be completed. I would add that by virtue of the United States Supreme Court decisions relative to prior approval in the movie areas, there must be provision for quick court review. In view of the complexities of the situation, it seems that university administrators ought not to undertake prior censorship of newspapers and handbills.

The question has arisen as to whether punishment can be given students who circulate publications that are vulgar or obscene. If the language were admittedly obscene, the answer would be easy. It would be in support of the right to discipline. But it must not be forgotten that the language's being vulgar does not necessarily mean it is obscene.

A federal court in Texas made this point graphically clear.[7] In the particular case the school newspaper printed material critical of the school. Such phrases as "High School is Fucked," "Fucked Rules," and "Big Shit" appeared with frequency. The court, however, held the language did not meet the definitions of obscenity even as applied to minors. The court said there was no appeal to purient interest. The court stated that something is not obscene because it contains blunt Anglo-Saxon words.

The Seventh Circuit Court of Appeals[8] also overlooked vulgar language in a high school publication, although it did comment that the vulgarity was found only in a random statement. This gives a hint that there might be a point of saturation which a court would not approve.

I personally would hope the courts could be convinced that a rule against substantial vulgarity is not an infringement upon First Amendment rights. When educators are trying to teach a rational way of criticism, it does not seem unreasonable to sustain a regulation against substantial vulgarity used in the criticism of educators. First Amendment rights seem amply protected by the wide protection which courts give to criticize schools and educators.

In 1969, a New York federal court did uphold the right of a school board to expel a student for distribution of an underground newspaper which used intemperate language to criticize school officials. The court stated that "gross disrespect is justification for suspension or expulsion." Unfortunately, I cannot at this time say that this is the thrust of the majority of decisions. I wish it were.

It is important to understand that the courts will generally find a violation of the due process clause of the Fourteenth Amendment when administrators attempt to discipline a student where the student could not reasonably have been expected to know that his conduct was prohibited. This requires administrators to promulgate rules and regulations.

Even if a rule is ennunciated, it can be struck down as unconstitutional because it is vague or overbroad. The term "vague," as the word implies, means not definite enough to convey its meaning. The term "overbroad" carries the connotation of attempting to forbid something which is constitutionally protected. The Seventh Circuit Court of Appeals[10] did not uphold the disciplinary action taken by the University of Wisconsin against students who disrupted classes because it found the action was taken under a vague rule which merely purported to give the university authority to punish for "misconduct." The court stated:

> No one disputes the power of the University to protect itself by means of disciplinary action against disruptive student power. But the first desideratum of a system of subjecting human conduct to the governance of rules is an obvious one--there must be rules.

And then there followed a very thought provoking statement:

> It is not an adequate answer to contend that the particular conduct which is the object of University discipline might have violated an applicable state or local law as otherwise merited punishment . . . Criminal laws carry their own definition and penalties and are not enacted to enable a University to suspend or expel.

I will now address myself briefly to the possibility of administrators' incurring **liability for crime investigations** on the grounds of an invasion of Fourth Amendment rights (the amendment in the United States Constitution which protects against unreasonable search and seizure).

At present the state of the law seems to be that an administrative search of student dormitories can be made without a warrant if the administrator has some specific reason to suppose that a rather grave offense has taken place or is taking place or that the evidence of that offense can be secured in the student dormitory. Authorities cannot engage in a

pure fishing expedition, and it appears that an attempt to force the student to sign permission to engage in such effort is not constitutionally valid.

A final area I will discuss today is the **liability for release of student records.** One aspect of this topic is the liability for disseminating material which may contain defamatory matter. It is possible that student records may contain such material--a notation of serious disciplinary action or comments relative to deficiency in mental and achievement abilities, for example.

The definition of defamatory matter is that calculated to hold one up to ridicule or contempt or to lower one's reputation in the eyes of a substantial, respectable minority. There is very little danger that an administrator who has custody of records will be liable in an action for slander or libel if he releases defamatory material. This is because the dissemination will usually be made to parties under the legal protection of qualified privilege. The law gives those who have custody of certain records the right to disseminate the material even if it is defamatory, if the law can find a **social importance** to justify such publication.

The law finds such social importance for the disseminations whenever it is reasonably necessary for:

1. The protection of one's own interest.

2. The protection of the valid interest of third parties such as employers and other university officials.

3. Protection of certain interests of the public. For example, if material is released to an educator who is going to work with the student and the information assists such person and the student is helped, society in general gains.

Qualified privilege, therefore, protects the administrator who has custody of certain records if the dissemination is to:

1. Prospective employers.

2. School authorities at institutions where the student may have applied.

3. Government investigators for the government as an employer.

4. Law enforcement officials. (Even if no warrant is presented, a party is entitled to assist society in the discovery of any crime.)

5. University personnel who will be working with the student in trying to assist with his development.

It seems important to emphasize that just because the law will often extend a qualified privilege to disseminate defamatory material about students it does not **require** dissemination. In other words, the administrator has great discretion and can refuse to disseminate unless the student gives permission or the production of records is commanded by court order.

There are certain people who have a right to demand to see certain school records. Parents of minors or adult students can demand to see records required to be kept by law. The general public cannot make this demand. The records are not fully public. They are open only to those with a sufficient interest.

In recent years certain administrators have refused to submit records even on court order on the grounds that the records constitute privileged communication. Privileged communications are recognized by the law--such, for example, as communications between attorney and client or husband and wife, confession to a clergyman, certain communication between physicians and patients. Educators have succeeded in this refusal to respond to court order only when a statute has extended to them such privilege. An example is found in the Wisconsin Statute.

> 885.205 PRIVILEGED COMMUNICATIONS. No dean of men, dean of women or dean of

students at any institution of higher education in this state, or any school psychologist at any school in this state, shall be allowed to disclose communications made to such dean or psychologist or advice given by such dean or psychologist in the course of counseling a student, or in the course of investigating the conduct of a student enrolled at such university or school, except:

1. This prohibition may be waived by the student.

2. This prohibition does not include communications which such dean needs to divulge for his own protection, or the protection of those with whom he deals, or which were made to him for the express purpose of being communicated to another, or of being made public.

3. This prohibition does not extend to a criminal case when such dean has been regularly subpoenaed to testify.

If a statute does extend such a privilege, I would feel that the student may have a cause of action against an administrator who violates the privilege, if damages can be established. In recent years we are beginning to think more and more about the right of privacy. The claim to privacy is a claim for personal freedom--the freedom of each to choose for himself the extent of his sharing with or withholding from others certain information.

There is always a degree of conflict between the need for personal privacy and the needs of the community to gather and have access to certain information. If a student were to instruct the university not to release his records without his permission, I suggest that the university should respect such a request unless it is ordered by a court to respond. As a matter of fact, I think the tendency today is for Universities to hold back the release of information unless a student has given permission for such dissemination.

I will make one final statement. I will predict that there will be some successful 42 U.S.C. Section 1983 actions if notations relative to serious disciplinary actions are placed upon student records in instances where the student may not have been accorded procedural due process.

FOOTNOTES

1. **Roth** v. **Board of Regents of State Colleges** and **Sindermann** v. **Perry** (April 1972).
2. **Asher** v. **Harrington, Klotsche, Young and the Regents of the University of Wisconsin.**
3. **Tinker** v. **Des Moines School District,** 393 U. S. 503 (1969).
4. **Belk** v. **the Chancellor of Washington University,** 336 F. Supp. 45 (E. D. Mo. 1970).
5. **Goldberg** v. **Regents,** 248 Cal. App. 2d 867, 57 Cal. Rptr. 463 (1967).
6. 440 F.2d 803 (1971).
7. **Sullivan** v. **Houston Independent School District,** 333 F. Supp. 1149 (1971).
8. **Scoville** v. **Board of Education of Joliet Township High School District,** 425 F 2d 10 (1970).
9. **Schwartz** v. **Schuker,** 298 F. Supp. 238 (1969).
10. **Soglin** v. **Kaufman,** 418 F. 2d 163 (1969).

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